Marriage and Marriage-Like Relationships

By : Dr. Martha Bailey

LAW COMMISSION OF CANADA
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BIOGRAPHICAL NOTE

Martha Bailey, LL.B. (Toronto), LL.M. (Queen's), D.Phil. (Oxford), is an assistant professor in the Faculty of Law at Queen's University. She has been a member of the Law Society of Upper Canada since 1983. She teaches and writes in the areas of Family Law, Private International Law, Health Law, and Contract Law. Recent publications include "Hawaii's Same-sex Marriage Initiatives: Implications for Canada" (1998) Canadian Journal of Family Law 153. Recent conference papers include "How Will Canada Respond to Foreign Same-sex Marriages?" presented 19 June 1998 at the Conference on Interjurisdictional Marriage Recognition, Creighton University School of Law, Omaha, Nebraska. Current research projects include "Telehealth – Law and Policy Issues" for the Social Sciences and Humanities Research Council Project on Trends. Martha Bailey is currently serving as the Women's Law and Legal Research Specialist for the Canada-China Women's Law Project, which is aimed at improving implementation of China's laws on the protection of the rights and interests of women.

MARRIAGE AND MARRIAGE-LIKE RELATIONSHIPS
EXECUTIVE SUMMARY

The declining importance of and commitment to marriage are reflected in increased rates of divorce, cohabitation outside of marriage, and out-of-wedlock births. These changes, along with greater recognition and tolerance for same-sex couples, have resulted in an effort to redefine the family, and there have been some responsive legal changes to the new family forms. Current laws, however, are not entirely consistent with the values of freedom of choice, mutual affection, autonomy, protection of the vulnerable, fairness, and equality that underlie marriage and marriage-like relationships. As well, existing laws are somewhat inconsistent with state objectives in relation to the family, which include procreation, maintenance of stable and nurturing environments for children, provision of a social support system for family members, and the promotion of social cohesion.

Over the past several years, legislators have ceded to the courts much of the responsibility for crafting family law and policy in relation to marriage-like relationships, particularly same-sex cohabitation. To some extent, courts have "rewritten" legislation to include same-sex couples or opposite-sex couples into the definition of "spouse" for various purposes. As well, courts have creatively applied non-family laws, including the law of contract, property and restitution, to cohabiting couples who were excluded from family law regimes. The result has been a patchwork of laws that do not express a coherent family policy. The provinces and the federal government, which share legislative authority in relation to marriage and marriage-like relationships, should resume responsibility in this area. At the least, laws that are patently vulnerable to a successful challenge under the *Canadian Charter of Rights and Freedoms* should be amended to bring them into line with *Charter* values. Beyond this, legislators should strive to bring current laws more into conformity with other generally accepted values and legitimate state objectives.

In recent years, many rights and obligations traditionally associated with marriage, e.g., the right to spousal support, have been extended to those in marriage-like relationships, particularly opposite-sex couples. Legal recognition of marriage-like relationships in Canada has largely been based on cohabitation. The extension of some marital rights and obligations to cohabiting parties provides protection for vulnerable parties on termination of a relationship by death or separation. In regard to public law matters, it will reduce government expenditure insofar as cohabitation disentitles parties from government benefits, but will increase government expenditure insofar as cohabitation entitles parties to government benefits. The test for extending marital rights and obligations to cohabiting couples varies from jurisdiction to jurisdiction, and within each jurisdiction according to the purpose of the legislation. Legislators should review the various tests to ensure that they express a coherent policy. Further extension of marital rights and obligations on the basis of cohabitation would avoid many *Charter* challenges but may be inconsistent with generally held values and legitimate state objectives.

For example, such an approach may undermine freedom of choice and autonomy for those who are unmarried and who do not want the rights and obligations of marriage thrust upon them.

Other western countries are facing the same questions as Canada in relation to marriage and marriage-like relationships. The laws and policies developed in other countries provide models for Canada to consider. Some jurisdictions are resisting the recognition of marriage-like relationships. Louisiana, e.g., has instead attempted to shore up traditional marriage, in part by making divorce more difficult for those who enter into a "covenant marriage." The efficacy of such legislation in regard to its express goals of preventing divorce or improving outcomes for children is open to question. More helpful models are laws and policies that are responsive to current demographic patterns and social values and that more effectively support state objectives.

One model to consider is the registered partnership legislation that has been enacted in Denmark, Norway, Sweden, Iceland, the Netherlands, and Hawaii. Many other countries are considering the issue, and there are registered partnership proposals or similar initiatives currently before the parliaments of Belgium, Spain, and France. Registered partnership legislation permits couples to obtain many marital rights and obligations by a process of registration. In the Nordic countries, registered partnerships are available to same-sex couples. In the Netherlands, opposite-sex or same-sex couples are entitled to register. In Hawaii, registration is available to same-sex couples or to other parties who are not legally permitted to marry, e.g. two sisters. In the Nordic countries and the Netherlands, registered partnership carries with it almost all marital rights and obligations, while in Hawaii it entitles a couple to only a limited range of marital rights and obligations. At least some aspects of the various registered partnership models seem to be consistent with Canadian values underlying marriage and marriage-like relationships and to provide an effective means of promoting legitimate state objectives. Registered partnership could be introduced to eliminate discrimination against same-sex couples by allowing them to obtain all or most of the rights and obligations of marriage by a process of registration. Registered partnership could also serve as a means of further extending marital rights and obligations to those in any type of marriage-like relationship without violating the autonomy rights of the parties.

The formulation of coherent family laws and policies will require that the international law implications be considered. International considerations may set a limit on domestic reforms. For example, intercountry adoption by same-sex couples may not be possible at this time. International considerations were taken into account by the countries that have adopted registered partnership laws. In considering the enactment of registered partnership laws and reviewing its cohabitation laws, law reformers should consider the extent to which a registered partnership or cohabitation relationship would be recognized internationally. There is also an issue of recognition between sister provinces.

If British Columbia, e.g., were to enact a registered partnership law, to what extent would a B.C. partnership be recognized in Alberta? In addition, Canada should consider to what extent it will recognize foreign registered partnerships and cohabitation relationships. If the Netherlands proceeds with its plan to legalize same-sex marriage by 1 January 2001, Canada will also need to be prepared to deal with the issue of recognition of foreign same-sex marriages. The Hague Conference on Private International Law may form a working group to address these issues, and it is recommended that Canada support an expert to participate in any such working group.

The following issues should be targeted for more detailed research and consideration:
a) whether Statistics Canada should be collecting data in relation to same-sex couples and adults living in non-conjugal but affective and interdependent relationships, and whether the "census family" should be redefined to include such relationships;
b) whether marital rights and obligations should be further extended to opposite-sex and same-sex couples;
c) whether marital rights and obligations should be extended to adults living in an affective and dependent/interdependent relationship but not in a conjugal relationship;
d) whether the state should continue to support couples, conjugal or otherwise, or instead individualize more government benefits and link "family" benefits, rights, and obligations to responsibility for dependent children;
e) whether the state should maintain or modify its role in regulating marriage and divorce;
f) whether a scheme of registered partnerships should be introduced;
g) which marital rights, obligations and benefits should require registration or marriage, and which should depend only on cohabitation;
h) whether same-sex marriage should be legalized; and
i) the private international law issues relating to registered partnerships, cohabitation and same-sex marriage.

MARRIAGE AND MARRIAGE-LIKE RELATIONSHIPS

I. INTRODUCTION

> The present erosion in marriage is unparalleled in this nation's history, or more generally, in the Western World, and many sociologists foresee deep changes to come. ... [P]eople are questioning the very rules governing social life, including the formation of couples, fertility itself and even the concept of family.[1]

A. Scope and Objectives

Traditionally the family has rested primarily on marriage, but significant social and legal changes have modified this tradition. The legalization of abortion and development of effective birth control methods have severed the link between sexuality and procreation. Because reproductive freedom allows parties to control pregnancy, marriage is no longer a prerequisite for regular sexual relations. Unmarried women who become pregnant may choose to give birth and keep their child, and procreation is no longer tied to marriage. Feminism and changes in the economy have increased the independence of young adults, who no longer have to marry to escape from parental control. The developing primacy of the individual over the family has meant an increasingly emphasis on self-fulfilment and less commitment to family.[2]

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[1] Jean Dumas & Yves Péron, *Marriage and Conjugal Life in Canada: Current Demographic Analysis* (Ottawa: Statistics Canada, 1992) at 106.

The declining importance of and commitment to marriage are reflected in increased rates of divorce, cohabitation outside of marriage, and out-of-wedlock births. These changes, along with greater recognition and tolerance for same-sex couples, have resulted in an effort to redefine the family, and there have been some responsive legal changes to the new family forms. Other western countries are experiencing similar social patterns and undertaking similar changes to their family laws. A few jurisdictions are trying to shore up marriage by making it more difficult to dissolve, by offering greater support for marriage, or by maintaining the legally privileged aspect of marriage while resisting the extension of legal privileges traditionally associated with marriage to other relationships. But most jurisdictions are responding to the increasing social acceptance of unmarried cohabitation and same-sex relationships by extending some of the rights and obligations traditionally limited to marriage to such relationships.

In this paper I look at how Canada has responded to changing family forms and

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[2] Various aspects of these trends are discussed in Arlene S. Skolnick & Jerome H. Skolnick, *Family in Transition*, 7th ed. (Boston: Little Brown, 1992); Antoine Prost, "Public and Private Spheres in France" in Antoine Prost & Gérard Vincent, eds., *Riddles of Identity in Modern Times* in *A History of Private Life*, Vol. 5, (Cambridge: Harvard UP, 1991) 1; Patricia H. Dyk, Cynthia R. Christopherson & Brent C. Miller, "Adolescent Sexuality" in Stephen J. Bahr, ed., *Family Research: A Sixty-year Review, 1930-1990*, Vol. 1 (New York: Lexington, 1991) 25; David Cheal, *Family and the State of Theory* (U of Toronto P, 1991).

whether Canadian laws are consistent with social values and objectives. I compare the laws surrounding marriage with those governing marriage-like relationships, taking into account the social context in which family law now operates. The marriage-like relationships examined here are opposite-sex cohabitation, same-sex cohabitation, and non-conjugal but affective and interdependent relationships between adults (e.g., two friends or a widowed mother and divorced daughter who live together). The comparison between marriage and marriage-like relationships supports the analysis of this conceptual paper, which is aimed primarily at identifying the issues, assumptions, social objectives and values underlying current laws, and the inconsistencies between social objectives and values and current laws. The examination of the laws relating to marriage and marriage-like relationships reveals problematic issues, and I discuss how the law addresses, or fails to address, them.

I also examine selected developments in other western countries in relation to marriage and marriage-like relationships. The comparative analysis is not based on a "law as rules" approach but instead seeks to place the legal rules of different countries within a wider context and to focus on the legal discourse, the reform debates, and the way lawyers reason about the law. In short, I have adopted a "law as culture" approach.[3] I have looked just at countries that are within the western legal culture because they are more likely to provide models that are adaptable within the Canadian cultural context than those within the Asian, Islamic, or African legal cultures. Another reason for focusing on western legal culture is that a pattern of

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[3] See generally Mark Van Hoecke & Mark Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" (1998) 47 International & Comparative Law Quarterly 495.

social change and law reform in relation to opposite-sex cohabitation and same-sex cohabitation can be discerned within that culture, particularly in some European countries. Canada has been following this pattern and might continue to do so. Therefore, examination of developments in countries that are a few steps ahead of Canada is useful.

The regulation of marriage and marriage-like relationships is a distinct issue from the regulation of parent-child relationships. The two issues often overlap, e.g., when the question is whether to permit adoption by same-sex couples. And in some jurisdictions, questions relating to children are linked closely to the regulation of marriage and marriage-like relationships because of legal distinctions based on whether a child is born within or outside of wedlock. England and Wales, e.g., extends joint parental responsibility to married parents, but in the case of unmarried parents the father does not automatically have parental responsibility, though he may obtain it by order or agreement.[4] In Canada, parental rights and responsibilities are not similarly linked to marital status. Even in countries where this link exists, it has been possible to proceed with legal reforms relating to the regulation of marriage-like relationships while dealing with issues relating to parent-child relationships separately. For example, most of the Nordic countries have enacted registered partnership laws that extend marital rights and obligations to registered same-sex partners with the exception of parental rights and responsibilities, which they are only now addressing as a separate issue. This paper focuses on the regulation of marriage and marriage-like relationships, and parent-child relationships will be addressed only peripherally.

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[4] U.K., *Children Act 1989* (1989, c.41).

This is a conceptual paper and intended to serve as a foundation for more detailed analysis connected with specific law reform initiatives. At the end of the paper, I identify issues that should be targeted for more detailed analysis and reform.

B. Terminology

I use the phrase "marriage-like relationships" to mean opposite-sex cohabitation, same-sex cohabitation, and non-conjugal but affective and interdependent relationships between adults. "Cohabitation" is used to connote living together in a conjugal or affective relationship. By "conjugal relationship," I mean cohabitation that includes a sexual or romantic relationship. The phrase "marital rights and obligations" is used to connote the bundle of legal rights, benefits, and obligations that traditionally were connected with marriage but that have been extended in part to those in some non-marital relationships. "Registered partnership law" includes any law that allows couples to register and thereby obtain some marital rights and obligations.

C. The Relatively Autonomous Nature of Law

This paper assumes that the law is a relatively autonomous system, that is, it does not wholly reflect social realities or respond to social changes, and it does not affect social practice in an unmediated way.[5] The legally defined family is not a reflection of nature, but a

[5] See generally Hugh Baxter, "Autopoiesis and the 'Relative Autonomy' of Law" (1998) 19 Cardozo L. Rev. 1987; N. Luhman, "Law as a Social System" (1989) Northwestern University Law Review 136; and G. Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993).

construction that reflects political, social, and religious choices and the internal logic of the law.[6] Marriage and marriage-like relationships shape the law only in a limited way. The relative autonomy of law means that the law has its own mechanisms for determining "truth" that are independent of the those used in, say, sociology or the natural sciences.

An illustration of the relatively autonomous nature can be drawn from Charles Dickens's novel *Oliver Twist*. When Mr. Bumble is told that he will be punished for the crimes of Mrs. Bumble, that in fact Mr. Bumble is "the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction," he is taken aback and responds: "If the law supposes that, the law is a ass – a idiot. If that's the eye of the law, the law's a bachelor; and the worst I wish the law is, that his eye may be opened by experience – by experience."[7] Mr. Bumble's experience as a "hen-pecked" husband who is controlled by his wife will be filtered out by the law's mechanisms for determining truth because it is information that does not fit within the logic of coverture and the law's assumption that husbands control their wives.

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[6] Some scholars suggest that the gap between legal or traditional definitions of the family and actual lived practices has increased because an increasing diversity in family forms is not reflected in the law. See Martha Minow, "All in the Family and In All Families: Membership, Loving, and Owing" in David M. Estlund & Martha Nussbaum, *Sex, Preference, and Family* (New York: Oxford University Press, 1997) 249 at 250.

[7] Charles Dickens, *Oliver Twist* (New York: Norton, 1993) 347 [first published in 1837].

Law reformers take on the project of making law less of an ass and more reflective of reality. In fact, when the federal government recently announced a proposal to redefine "spouse" for immigration purposes to include unmarried partners of the same or opposite sex, Immigration Minister Lucienne Robillard commented that "all I want to do is reflect the reality here, because in the present act only a married couple is recognized."[8] The government's effort to import more information from "out there" into the law will result in a new construction of the family that reflects political and social choices and the internal logic of the law. The new law will be more consistent with and have some effect on how people live, but the metaphor of "reflecting reality" exaggerates what can be done.

The effects of the law on marriage and marriage-like relationships are not straightforward. Martha Minow argues persuasively that the family is a legal artefact, and that the relationships people form and the commitments they make to one another are shaped by laws and institutions.[9] Parties structure their relationships within the existing legal framework, but the outcomes are not always those intended. Mary Ann Glendon suggests that while the law may have an impact of ideas, attitudes, and ultimately the formation of social consensus, the relationship between law and behaviour is uncertain.[10] For example, the

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[8] Quoted in Estanislao Oziewicz, "Robillard is Seeking Same-sex Rights for Immigrants" *The Globe and Mail* (8 January 1999).

[9] Martha Minow, "All in the Family and In All Families: Membership, Loving, and Owing" in David M. Estlund & Martha Nussbaum, *Sex, Preference, and Family* (New York: Oxford UP, 1997) 249.

[10] Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge: Harvard UP, 1987) at 60.

criminalization of homosexuality did not eliminate same-sex relationships but instead served to drive them underground. There has been a long history of normative family laws aimed at controlling the behaviour of couples. For example, the notion that women should be pressured to remain with their husbands by denying mothers the right to access to their children following separation was an explicit reason for the maintenance of almost absolute paternal control over children in England until 1839.[11] Permitting judicial divorce in England, and subsequently Canada, was also resisted because of fears that there would be large numbers of divorces that would threaten the stability of society. After the legalization of judicial divorce, there was an increased demand for divorce, but whether this indicated an increased level of breakdown is unclear.[12] Max Rheinstein, among others, has argued that law is not the main determinant of marital stability, commenting that "a strict statute law of divorce is not an effective means to prevent or even to reduce the incidence of marriage breakdown."[13]

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[11] *Custody of Infants Act*, 2 & 3 Vict., c.54. Sir Edward Burtenshaw Sugden, arguing against the first law to grant mothers the right to apply for access said in the House of Commons Debates, 14 February 1838, 1114-1119: "When the wife knew that she could not have access to her children after leaving her husband's house, she was unwilling to separate herself from him for light causes: supposing this Bill to pass into law she would argue thus: – 'I can now have access to my children when I please and I will separate immediately from my husband.'"

[12] Lord Campbell, one of the advocates of judicial divorce, expressed misgivings about the new divorce law, fearing that it caused marriage breakdown. On 10 January 1859, he wrote: "I have been sitting two days in the Divorce Court, and, like Frankenstein, I am afraid of the monster I have called into existence ... [T]here seems some reason to dread that the prophecies of those who opposed the change may be fulfilled by a lamentable multiplication of divorces, and by the corruption of public morals." The Honourable Mrs. Hardcastle, ed., *Life of Lord Campbell*, Vol. II (London: John Murray, 1881) at 361-62.

[13] Max Rheinstein, *Marriage Stability, Divorce and the Law* (Chicago: U of Chicago P, 1972) at 406.

As prescriptive laws regulating family structure were increasingly perceived as ineffective and illegitimate, no-fault divorce laws were introduced, marking the withdrawal of the state from normative interventions into family life.

As the state has moved away from regulating the structure of family, its main project in relation to the family has become regulating family obligations, particularly financial obligations.[14] In order to regulate family obligations (between family members, and between families and third parties, including the state), it is necessary to define the family. Defining the family is problematic, however, in the post-prescriptive family law era. On one hand, the state takes a *laissez-faire* attitude towards family structure – we now have considerable freedom to enter into and structure relationships as we see fit. On the other hand, the state privileges certain family structures by including them within its family regulatory scheme while excluding others. The privileging of certain family structures is challenged as a continuation of the now illegitimate normative regulation of family structure. Because the justification for privileging particular relationships is no longer self-evident, the state must develop a rationale for its scheme of family regulation.

Two arguments are generally offered for legally privileging certain relationships. Those supporting an expansive definition of the family invoke constitutional principles – particularly equality, liberty, and respect for the inherent dignity of all persons – to justify the reformulation of the definition of family to include previously excluded relationships. Advocates of an expansive definition of family also argue that non-traditional relationships

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[14] Mavis Maclean, "Child Support in the U.K.: Making the Move From Court to Agency" (1994) 31 Houston Law Review 515 at 520-21.

often fulfil functions traditionally associated with marriage that the state has an interest in supporting, and that these relationships should therefore be regulated in the same way as marriage. Functional analysis is also used by those who support a narrow definition of family. These advocates of a narrow definition argue that marriage should be privileged over other relationships because it is best at, if not uniquely capable of, fulfilling the functions of procreation and the creation of stability. The arguments for legally privileging certain relationships will be explored in this paper. I note here that the capacity of the law to apply a functional analysis and fully capture the complexities of family arrangements in definitions of "spouse" or "family" is limited.

For those engaged in reform of the law dealing with marriage and marriage-like relationships, the view that law is relatively autonomous implies modesty in relation to the goal of reflecting in the law the way we live today. The complexity of the social world as perceived and experienced must be reduced in order to be manageable by law. Legal definitions of "spouse," "parent," and so on, can only ever be reconstructions as valid legal communications of selected truths generated by discourses outside the law. Justice McLachlan adverted to the limited ability of the law to reflect the reality of how we live in *Miron* v. *Trudel*, in her discussion of the state's use of "markers" to identify the families that should be included within a statutory family car insurance scheme. She wrote that "a good marker excludes most people who should be excluded given the goal of the legislation, and only a few who should not," and that "[t]he standard which the legislator must meet is not perfection,

but reasonableness."[15] One of the projects of family law reformers is to develop reasonable "markers," and this paper is a contribution to that project.

[15] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 ("*Miron*") at para. 167.

II. SOCIAL VALUES AND OBJECTIVES UNDERLYING MARRIAGE AND MARRIAGE-LIKE RELATIONSHIPS: DISCREPANCIES BETWEEN THESE VALUES AND OBJECTIVES AND THE LAW

> [Marriage] is part of the normative reality of a state, and in many states marriage is considered the prime institution for social regulation and control. Family law principles are therefore often regarded as a matter of a country's public policy.[16]

There is considerable division among Canadians with regard to the social values and objectives underlying marriage and marriage-like relationships. Some take the view that marriage is fundamental to the stability and well-being of the family and that extending marital rights and obligations to unmarried couples undermines the family to the detriment of society. Others argue that some non-marital relationships are equally worthy of support and contribute equally to the stability and well-being of the family and other state objectives. The division among Canadians on the social values and objectives underlying current law on marriage and cohabitation is mirrored by divisions among the justices of the Supreme Court of Canada, who have been left much of the responsibility of setting social policy and law in this area.[17]

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[16] Barbara E. Graham-Siegenthaler, "Principles of Marriage Recognition Applied to Same-sex Marriage Recognition in Switzerland and Europe" (1998) 32 Creighton L. Rev. 121.

[17] See *Egan* v. *Canada*, [1995] 2 S.C.R. 513 ("*Egan*"), and *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

While there is considerable division among Canadians in regard to the values underlying marriage and marriage-like relationships, certain core values can be discerned in public discourse about these relationships. The core values are freedom of choice, mutual affection, autonomy, protection of the vulnerable, fairness, and equality. The law is not completely consistent with these core values. For example, at least some of the laws that distinguish between married and unmarried couples to the disadvantage of the latter are inconsistent with the value of equality.[18]

The objectives underlying the law of marriage and marriage-like relationships addressed here are to promote procreation, to provide stable, nurturing environments for children, to provide a social support system for family members, and to promote social cohesion. Some of the current laws that distinguish between marriage and marriage-like relationships are inconsistent with these objectives, because marriage-like relationships that fulfil these objectives are not given the same level of legal support as marriage.

This section of the paper considers the values and state objectives underlying marriage and marriage-like relationships identified above. As well, this section considers discrepancies between values and state objectives and the effects produced by law. Before considering the values of freedom of choice, mutual affection, autonomy, protection of the vulnerable, fairness, and equality, religious values and their role in marriage law are discussed.

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[18] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

A. Values

Religious values

Religious values have historically been intertwined with the law of marriage and marriage-like relationships. The religious roots of marriage in post-settlement Canada were canvassed fully in *Reference re Marriage Act (Canada)*.[19] Marriage was controlled by the Roman Catholic and Anglican churches, and gradually other religious denominations were accorded the power to solemnize and register marriages. Religion remains part of provincial marriage laws, which anticipate and provide for religious marriage ceremonies.[20] Many couples continue to marry in religious ceremonies, but this may reflect an acceptance of the conventional role of religion in weddings rather than any religious belief or commitment. Anthropologist Ellen Lewin points out that:

> Catering halls and hotels often supply their clients with referrals to clergy willing to perform weddings for couple not affiliated with their denominations or with specific congregations. Churches – particularly in mainline Protestant denominations – may be wedding sites for couples who have no ordinary connection with them, and many churches, in fact, depend upon wedding rentals (along with rental to twelve-step groups, community organizations, and child care centers) for part of their financial base.[21]

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[19] *Reference re Marriage Act (Canada)* (1912), 46 S.C.R. 132.

[20] See, e.g., Ontario's *Marriage Act*, R.S.O. 1990, c. M.3, which provides for publication of banns in church and the solemnization of marriages by persons ordained or appointed according to the rites and usages of religious bodies.

[21] Ellen Lewin, *Recognizing Ourselves: Ceremonies of Lesbian and Gay Commitment* (New York: Columbia UP, 1998) at 55.

Canadian census data indicate that religious affiliation of Canadians is decreasing – in 1991, 12.4% of Canadians reported no religious affiliation, and there was a 90% increase in those reporting no religious affiliation between 1981 and 1991.[22] Canada has experienced some increase in religious diversity, although the 1991 census reports that 81.9% of Canadians described themselves as Christian – 45.7 % of Canadians reported that they were Roman Catholic, 36.2% were Protestant, and 5.8 percent were of other religions. Thus, the large majority of religiously affiliated Canadians are Christian. Religious practice, i.e., attending religious services, has declined significantly among Canadians, to an even greater extent than religious affiliation.

Religious practice, as opposed to reported religious affiliation, is linked with family structure. Women who attend weekly services are much less likely to cohabit outside of marriage than those who never attend.[23] Even those who attend services occasionally are far less likely to cohabit outside of marriage.[24] Being married and having children are more important to those who attend services than to those who do not, and regular attendance at services is related to "stronger" marriages.

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[22] Statistics Canada, (1998) online: http://www.statcan.ca.

[23] Pierre Turcotte and Alain Bélanger, "The Dynamics of Formation and Dissolution of First Common-Law Unions in Canada" (1998) online: Statistics Canada http://www.statcan.ca/english/Vlib/Research/other9.htm.

[24] *Ibid.*

[25] While noting that religious observance is connected with "more traditional family values" and that religious people "tend to report having happier, less stressful lives and happier relationships with their partners," Warren Clark reports that Canada is becoming "increasingly secular" as the "number of Canadian reporting no religious affiliation is increasing and attendance at religious services is declining."[26]

Religions vary in their attitudes towards homosexuality and same-sex couples, and within particular religious organizations there is also a diversity of opinion, which has given rise to acrimonious debate among some religious groups.[27] Saul Olyan and Martha Nussbaum have commented on this ongoing debate:

> Roman Catholics, Jews, and members of major Protestant denominations are presently engaged in vigorous deliberation about the proper place of bisexuals, lesbians, and gay men in religious communities; about how those communities ought to regard same-sex behavior; and about whether those communities and their individual members ought to advocate, oppose, or take no public position on civil rights protections and other proposed legal rights and benefits – including marriage – for gay men, lesbians, and bisexuals.[28]

Some religions provide blessings, weddings, or commitment ceremonies for same-sex couples who are not able to legally marry.

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[25] Warren Clark, "Religious Observance, Marriage and Family (1998) 50 Canadian Social Trends 2 at 3, 4 and 6.

[26] *Ibid.* at 6-7.

[27] Lila Sarick, "B.C. Anglicans to Go Slow on Blessing Gay Relationships" *The Globe and Mail* (12 May 1998).

[28] Saul M. Olyan & Martha C. Nussbaum, *Sexual Orientation and Human Rights in American Religious Discourse* (New York: Oxford UP, 1998) at xiii.

Lewin comments that many lesbians and gay men also tend to imagine their weddings as occasions that demand some sort of religious or spiritual component. This dimension often functions as a way to elaborate a sense of connection with other sources of identity – ethnicity, race, and family tradition – beyond those derived from sexual orientation.[29]

The religious roots of marriage law remain apparent in the rules governing the formalities and validity of marriage, but the religious aspects of marriage law are historical artefacts rather than an indication of the vitality of religious values in relation to marriage. The link between religious values and marriage law has been severed because the religious aspects of legal marriage are now formalities for many, while at the same time some of those who do hold religious values in relation to marriage are excluded from legal marriage and celebrate their unions in religious ceremonies that are outside the scope of the law.

An example of an explicit removal of religious values from the law of marriage is the 1990 *Marriage (Prohibited Degrees) Act*, which abolished many prohibitions against marriage with relatives.

[30] The previous law on the prohibited degrees of consanguinity and affinity had clear

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[29] Ellen Lewin, *Recognizing Ourselves: Ceremonies of Lesbian and Gay Commitment* (New York: Columbia UP, 1998) at 55.

[30] *Marriage (Prohibited Degrees) Act*, S.C. 1990. The law prohibits marriage only between those related lineally by consanguinity or adoption, as brother and sister by consanguinity, whether by whole blood or half-blood, or as brother or sister by adoption. Other related persons, e.g., an uncle and niece, or a step-father whose marriage has ended by death or divorce and his step-daughter, are now free to marry.

religious roots, and in the common law provinces and territories had been adopted from Archbishop Parker's Table of 1562, which was later included in the Church of England's Book of Common Prayer. In commenting on the 1990 amendments, Bruce Ziff observed that the traditional policies behind the old prohibitions included "the preservation of perceived societal norms or Judeo-Christian religious beliefs."[31] Religious and other organizations raised moral objections to the new law, but legislators rejected their arguments, saying that individuals could govern themselves by their own values, but that the law of the land should be as unrestricted as possible. During the Senate debates it was said that "socially undesirable marriages ... take place for many, many reasons and we cannot and do not attempt to legislate to prevent those marriages."[32] The *Marriage (Prohibited Degrees) Act* not only removed religious values from marriage law, but also marked the retreat by the state from its role of sanctioning the morality of relationships.

In jurisdictions that have adopted registered partnership schemes that give registered partners a status similar to that enjoyed by married couples, some are questioning the need for the state to remain in the marriage "business."

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those related lineally by consanguinity or adoption, as brother and sister by consanguinity, whether by whole blood or half-blood, or as brother or sister by adoption. Other related persons, e.g., an uncle and niece, or a step-father whose marriage has ended by death or divorce and his step-daughter, are now free to marry.

[31] Bruce Ziff, "Recent Developments in Marriage and Divorce" (1986) 18 Ottawa Law Review 121 at 135.

[32] Canada, Senate Debates (1985), 1744-50 at 1749.

With the enactment of registered partnership laws, marriage could be left to religious organizations. Professor Sylvia Wortmann of the Dutch Ministry of Justice has made this suggestion.[33] The idea has been put forward in Hawaii as well.

After Hawaiians ratified a constitutional amendment that will allow state legislators to ban same-sex marriage, Hawaii's governor, Ben Cayetano, announced that he would push for enactment of a more expansive registered partnership law. Cayetano takes the position that registered partnership is a way to end the debate over same-sex marriage that has divided Hawaii. He said in 1996: "The institution of marriage should be left to the church. The government needs to explore its role in marriages. The government should not be in the role of sanctifying marriages."[34]

Some religious leaders also have suggested that the religious aspects of marriage should not be intertwined with the legal aspects. Dr. Pamela Young, head of the Department of Religious Studies at Queen's University, noted that the only time she is called on to act as an "agent of the state" is when she performs marriage ceremonies. She questioned whether this was an appropriate role for a member of the clergy, and noted that it is particularly problematic to perform this role for couples who hold no religious values in relation to marriage.[35]

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[33] Interview with the author, The Hague (26 November 1998).

[34] Mike Yuen, "Same-sex Marriage Debate Rages on, Now Over Domestic Partnership Bill" *Honolulu Star-Bulletin* (6 November 1998).

[35] Interview with Pamela Young, Kingston, Canada (24 February 1999).

Marriage and divorce are currently governed by law. Many parties marry in a religious ceremony. For some, e.g., same-sex couples, civil marriage is not possible, and religious "marriage" or some other non-legal ceremony is all that is available to them. As the legal significance of marriage declines, an issue arises as to whether the status of marriage and divorce should continue to be governed by the law. Perhaps the state should govern matters such as marital property, spousal support, and pension rights according to whether parties register or cohabit, and leave marital status as a personal matter for the parties to deal with according to their religious faith or other beliefs.

Freedom of choice, mutual affection, autonomy, protection of the vulnerable, fairness, and equality

While religious values in relation to marriage or marriage-like relationships are less prominent today, other values have become more important. These values are freedom of choice, mutual affection, autonomy, protection of the vulnerable, fairness, and equality.

Marriage requires a conscious choice by the parties – a relationship of cohabitation might gradually evolve, but marriage demands a clear and definite act for its formation. Choice is fundamental to marriage, and lack of consent will invalidate a marriage.[36] Freedom of choice has become an even stronger value in the 20th century, as marriage has evolved from a relationship to be entered into at the instance of one's family to a matter strictly of individual choice.

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[36] *Hirani* v. *Hirani* (1983), 4 F.L.R. 232 (C.A.).

The decision to marry or to form a marriage-like union is now generally based on the mutual affection of the couple rather than financial or social calculation on the part of the parents. Although arranged marriages and marriages of convenience take place in Canada,[37] historians and sociologists agree on the shift in the industrialized western world from marriages that were the concern of the larger kinship network and that were not necessarily consistent with the individual choice of the spouses to 20th-century marriages that are freely chosen by the spouses and characterized by "intense affective and erotic bonding."[38]

The law imposes some restrictions on the freedom of parties to marry. For example, one may not marry close relatives.[39] For the most part, existing legal restrictions on the freedom to marry are accepted as reasonable limits. The restriction on the freedom of same-sex couples to marry, however, is under challenge, in part because it is arguably an unreasonable limit on freedom of choice.

In *Layland* v. *Ontario*, the applicant unsuccessfully challenged the exclusion of same-sex couples from marriage, and Greer J., based her dissenting opinion in part on the freedom of choice argument, saying:

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[37] *Parihar* v. *Bhatti* (1980) 17 R.F.L. 289 (B.C.S.C.) (arranged marriage); *Iantisis* v. *Papatheodorou*, [1971] 1 O.R. 245 (C.A.) (immigration marriage).

[38] Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800* (New York: Harper & Row, 1977 685. See also Lucy Mair, *Marriage* (Harmondsworth: Penguin, 1971) at 18-19.

[39] *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46.

> The *Charter* cases show that our courts have found that "choice" is a benefit of the law. In the case at bar, the applicants have been denied their right to choose whom they wish to marry. In my view, the right to choose is a fundamental right and it applies to the context of marriage in our society. It is a basic theory in our society that the state will respect choices made by individuals and the state will avoid subordinating these choices[40]

A corollary to freedom of choice and love in relation to forming unions is freedom to dissolve unions when the mutual affection of the couple has disappeared. In the 19th century, the notion prevailed that a married couple had a duty to the state and their children to remain together unless a "matrimonial fault" could be proven. At the time, Lord Eldon asserted:

> [W]hether the contract of marriage be, as I think it is represented by some, a civil contract only, or whether it be both civil and religious, it is one of a very peculiar nature; it is one which the parties cannot dissolve: one by which they impose duties on themselves, and by which they engage to perform duties with respect to their offspring; duties which are imposed as much for the sake of public policy as of private happiness.[41]

During the same period, a popular legal journal stated that "the principle that the will of the parties might effect the dissolution of the marriage state" was "in direct violation of the settled law on this subject."[42]

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[40] *Layland* v. *Ontario* (1993), 14 O.R. (3d) 658 (Div. Ct.).

[41] *Westmeath* v. *Westmeath*, (1820) 37 E.R. 796 at 800.

[42] "The Custody of Infants Bill" (4 August 1838) 16 *Legal Observer* 274-75.

Today, the notion that a couple should be forced or pressured by the state to remain married seems antithetical to the generally held view that marriage should be based on freedom of choice and mutual affection, and the law now provides for "no-fault" divorce after separation for one year.[43] The current assumption is that marriage is primarily a concern of the parties involved.[44] Parties are now free to marry and to dissolve their marriage in accordance with their own morality or sense of utility.

Marriage now can be dissolved easily, but a legal process is required. Either party to a marriage may unilaterally separate at any time without any legal process. But dissolution of a marriage requires a divorce, and the court may review and override agreements made by the spouses in the process.[45] Cohabitation may be unilaterally dissolved at any time, and no legal procedures are required. Thus, it is possible in the case of a non-marital relationship to avoid scrutiny by the state of the terms of separation.

The lack of scrutiny may be problematic in relation to vulnerable persons – a child or an economically dependent partner – if the dominant partner enforces unfair terms on the other.

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[43] *Divorce Act*, R.S.C. 1985, c. 3, s.8.

[44] Lucy Mair, *Marriage* (Harmondsworth: Penguin, 1971) at 18-19.

[45] In particular, the *Divorce Act*, s.11(1)(b) requires the court to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage and to stay the granting of the divorce until such arrangements are made.

On the other hand, the scrutiny of a divorce court may interfere with the freedom of choice to terminate a marriage or with the autonomy of the parties in relation to the terms of separation.[46]

Autonomy is another important value underlying marriage and marriage-like relationships. This value is often cited as a reason not to impose marital rights and obligations on unmarried persons. For example, Minister of Justice Serge Ménard explained to the National Assembly of Quebec why the province did not previously include unmarried couples within its scheme of marital rights and obligations, saying:

Lorsque le législateur a révisé le droit de la famille, tant en 1980 qu'en 1991, il s'est interrogé sur l'opportunité de prévoir des conséquences civiles aux unions de fait. S'il s'est abstenu de le faire, c'est par respect pour la volonté des conjoints: quand ils ne se marient pas, c'est qu'ils ne veulent pas se soumettre au régime légal du mariage.[47]

The increasing emphasis on individual autonomy and the freedom to shape relationships without undue interference has been identified by many researchers.[48]

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[46] See, e.g., *Harper* v. *Harper* (1991), 78 D.L.R. (4th) (Ont. Gen. Div.), where the court stayed the granting of a divorce because it was not satisfied that the agreement of the parties met the standard of a reasonable arrangement for the support of the children of the marriage.

[47] Quebec, Debates of the National Assembly, 18 June 1998. See also Alberta Law Reform Institute, *Towards Reform of the Law Relating to Cohabitation Outside of Marriage*, Report No. 53 (Edmonton, June 1989) at 13.

[48] Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800* (New York: Harper & Row); Mary Ann Glendon, *The New Family and The New Property* (Toronto: Butterworths, 1981); Jana B. Singer, "The Privatization of Family Law" (1992) Wisconsin Law Review; Martha Minow, "'Forming Underneath Everything That Grows': Toward a History of Family
Law" (1985) Wisconsin Law Review 819 at 827-34.

The value of autonomy is tempered by the sometimes competing values of protecting the vulnerable. It is now widely accepted that the state should intervene to protect those who are abused by their spouses or partners. In 1990, Wilson J., writing for the majority of the Supreme Court of Canada, outlined changing attitudes to spousal abuse over time:[49]

[T]he law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his "right" to chastise her. One need only recall the centuries old law that a man is entitled to beat his wife with a stick "no thicker than his thumb."

Laws do not spring out of a social vacuum. The notion that a man has a right to "discipline" his wife is deeply rooted in the history of our society. The woman's duty was to serve her husband and to stay in the marriage at all costs "till death do us part" and to accept as her due any "punishment" that was meted out for failing to please her husband. One consequence of this attitude was that "wife battering" was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day.

Fortunately, there has been a growing awareness in recent years that no man has a right to abuse any woman under any circumstances.

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[49] *R.* v. *Lavallee*, [1990] 1 S.C.R. 852.

Elizabeth Pleck has pointed out that public attention to domestic violence is not a modern phenomenon. Pleck traced shifting responses to domestic violence over time, linking these responses to changing attitudes towards state intervention in the family: "Greater suspicion of government intrusion or increased respect for family privacy would diminish support for social policies against family violence."[50]

Currently, there is widespread support for strong social policies against family violence, and general acceptance that autonomy and family privacy should be subject to state intervention to protect the vulnerable.

As well as accepting state intervention to protect vulnerable parties from physical abuse, most Canadians accept that economically vulnerable partners should not be left destitute at the end of a relationship, and that the state may legitimately override the autonomy of the parties to avoid this result. But legal protections for economically dependent persons are largely aimed at marriage and, to a lesser extent, opposite-sex cohabitation. Economically dependent persons in other marriage-like relationships have a lower level of or no protection against being left destitute on termination of the relationship. It should also be noted that the extent to which former partners to a marriage are expected to bear responsibility for the support of economically dependent persons has declined.

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[50] Elizabeth Pleck, *Domestic Tyranny*, (Oxford: Oxford UP, 1987) 6.

And the extent to which autonomy should be overridden to protect vulnerable persons is a matter of debate.[51]

Currently spouses are free to contract out of many but not all rights and obligations associated with marriage. Quebec restricts parties from contracting out of marital property rights, but the other jurisdictions allow this to occur.

There are limitations in regard to contracting out of rights and obligations relating to spousal support, child support, and child custody and access. One question to address is whether it is problematic that parties may contract out of some or all of the rights and obligations of marriage is problematic, e.g., because it may leave a dependent spouse vulnerable to economic abuse.

The law is ambivalent with regard to allowing parties to determine for themselves the rights and obligations that should apply during a marriage or on breakdown of the relationship. Traditionally, the assumption was that the state had a vital interest in the legal relationship between man and wife, and that it was the role of state, operating through the legal system, and not for the parties through private agreement, to determine the terms governing their relationship or its breakdown.

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[51] See, e.g., *Pelech* v. *Pelech* [1987] 1 S.C.R. 801, where the autonomy of the parties to determine the terms of their separation came into conflict with the value of protecting vulnerable persons, because the former wife had become destitute and was seeking to vary the terms of the parties' agreement.

This traditional assumption was clearly expressed in early cases relating to the validity of separation agreements.

Private negotiation of marital rights and obligations has been encouraged, in part because such matters are now considered more the business of the parties than the state, but also because private negotiation of marital rights and obligations serves the interest of the state in reducing public expenditure on court proceedings.[52] Sociologist Mavis Maclean observes that there has been a withdrawal over the past decade of private family law from normative or prescriptive intervention in family life.

This movement accords with the positive evaluation of the private nature of family rights and obligations, and a preference for these to be negotiated and implemented by family members without external intervention, which characterises public policy towards the family during the 1980s. As family obligations and expectations become more varied, and family structures become more fluid and more complex, state regulation of family structure has decreased while state regulation of family obligations, particularly financial obligations has increased.[53]

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[52] S.M. Cretney & J. Masson, *Principles of Family Law* (London: Sweet & Maxwell, 1997) at 5.

[53] Mavis Maclean, "Child Support in the U.K.: Making the Move From Court to Agency" (1994) 31 Houston Law Review 515 at 520-21.

The extent to which the state will support private ordering by family members was canvassed in *L.G.* v. *G.B.*, in which the Supreme Court of Canada ruled on the variation of a spousal support order that was based on an agreement of the parties.[54]

This issue has been controversial in Canada since the Court's 1987 rulings in *Pelech* v. *Pelech*, *Caron* v. *Caron*, and *Richardson* v. *Richardson*, cases that are referred to as "the trilogy."[55]

The test enunciated in the trilogy required a party seeking variation of a spousal support order based on an agreement to show that there had been a radical change of circumstances causally connected to the marriage. This test was widely criticized for emphasizing finality, self-sufficiency, and a clean break at the expense of fairness.[56]

In *L.G.* v. *G.B.*, Justice L'Heureux-Dubé's concurring opinion set out a new approach to the issue of variation of support orders based on agreements.

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[54] *L.G.* v. *G.B.*, [1995] 3 S.C.R. 370 [hereinafter "*L.G.*"].

[55] *Pelech* v. *Pelech*, [1987] 1 S.C.R. 801; *Caron* v. *Caron*, [1987] 1 S.C.R. 892; and *Richardson* v. *Richardson*, [1987] 1 S.C.R. 857.

[56] Several of the critical comments on the trilogy are mentioned in L'Heureux-Dubé J.'s opinion in *L.G.*

She stated that parties should be encouraged to reach an agreement on the economic consequences resulting from their divorce, but that such agreements are only one factor to be considered in the exercise of the judge's discretionary power. The weight to be given to an agreement should depend on the extent to which the agreement reflects the principles and objectives set out in the *Divorce Act*, and on the nature of the change that has occurred. The more the agreement or support order takes into account the *Divorce Act* principle of promoting an equitable distribution of the economic consequences of the marriage and its breakdown, the more likely it will be to influence the outcome of the variation application. Justice L'Heureux-Dubé stressed that agreements on spousal support do not oust the court's jurisdiction to exercise its discretionary power to award support in accordance with the facts of each case and the factors and objectives set out in the *Divorce Act*.

Justice L'Heureux-Dubé's rejection of the trilogy and her enunciation of a new approach to the issue of variation of support orders based on agreements were not adopted by the majority, the approach similar to that outlined in her opinion is likely to be adopted by the other justices when the issue is squarely before the Court. Justice L'Heureux-Dubé's minority opinion was closely tied to the language of the 1985 *Divorce Act*, while the trilogy, which was decided under the 1968 *Divorce Act*, of course was not. The Supreme Court of Canada has given careful attention to the language of the *Divorce Act* in formulating the test for determining spousal support[57] and the test for variation of child support orders and

[57] *Moge* v. *Moge*, [1992] 3 S.C.R. 813.

custody orders,[58] and is likely to be similarly respectful of the statutory language in ruling on variation of consent spousal support orders. If L'Heureux-Dubé J.'s minority opinion is accepted as an authoritative statement of the law, the broader discretionary power of courts to override support agreements that do not reflect the *Divorce Act* principle of promoting the equitable distribution of the economic consequences of the marriage and its breakdown may come into conflict with the autonomy of parties.

In addition to the value of protecting vulnerable persons, the value of autonomy is subject to a concern for fairness. In 1975, the Supreme Court of Canada rejected the claim of Mrs. Murdoch to an interest in a ranch that had been acquired in the name of her husband during their 25-year marriage. Mrs. Murdoch's claim was based on her substantial contribution to the work on the ranch "haying raking, swathing, mowing, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done," but the Supreme Court accepted that this was simply that "the work done by any ranch wife" and that Mrs. Murdoch was not entitled to a share of the property.[59] Today, it is widely accepted that property acquired through the labour or contributions of a couple should not be kept by one member of the couple if the relationship ends and that the property should be divided fairly.

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[58] *Willick* v. *Willick*, [1994] 3 S.C.R. 670 (child support); *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27 (custody).

[59] *Murdoch* v. *Murdoch*, [1975] 1 S.C.R. 423.

There may be ongoing debate about what constitutes a fair division of property, but no one argues today that one party should keep all the property acquired by a couple during a relationship, at least without the other party's free and informed agreement.

The law now provides for marital property division in every province and territory, but only for married couples. Under the common law doctrine of unjust enrichment or the Civil Code provisions on partnership, contract or unjust enrichment, a party to a marriage-like relationship may obtain a share of property based on the party's contribution.[60]

As well, unmarried couples are free to enter into a statutory domestic contract or a private contract to address property issues. But perhaps marital property rights and obligations should be extended to at least some of those in marriage-like relationships. Extending full marital property rights on the basis of cohabitation would perhaps go too far in undermining the principle of autonomy. But extending marital property rights on the basis of registration under a registered partnership scheme would respect the principle of autonomy while providing while eliminating one form of discrimination against unmarried couples. As with property rights, possessory rights in a "matrimonial home" are for the most part limited to married parties.[61] Providing statutory protection against peremptory ouster on termination of a relationship by death or separation for cohabitants, regardless of their marital or registration status, would be consistent with the value of protecting the vulnerable while not unduly encroaching on the autonomy of property holders.

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[60] *Peter* v. *Beblow*, [1993] 1 S.C.R. 980; *Beaudoin-Daigneault* v. *Richard*, [1984] 1 S.C.R. 2.

[61] See, e.g., *Family Law Act*, R.S.O. 1990, c. F.3, s. 1 and Part II, and *Czorna v. Lonergan* (1987), 7 R.F.L. (3d) 458 (Ont. Dist. Ct.) .

Equality is another value underlying marriage and marriage-like relationships. The *Canadian Charter of Rights and Freedoms* provides in s.15 that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[62]

Discrimination on the basis of the enumerated or analogous grounds is prohibited, and sexual orientation and marital status have been held by the Supreme Court of Canada to be analogous grounds.[63]

The value of equality may conflict with the legally privileging of marriage. Marriage is no longer a prerequisite for all marital rights and obligations. Cohabiting couples, including same-sex couples, now have many of the same mutual rights and obligations as married couples, and are entitled to many of the same employment and government benefits. But the regulation of cohabiting couples is inconsistent across Canada and does not express a coherent social policy. For the most part, marital rights and obligations are not extended to adults who are in an affective and dependent or interdependent relationship but not a conjugal relationship. Even opposite-sex couples whose relationships are almost identical to marriage are not given the same rights and obligations as married couples, and remaining distinctions

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[62] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "the *Charter*"], s.15.

[63] *Egan* v. *Canada*, [1995] 2 S.C.R. 513 (sexual orientation); *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 (marital status).

may be challenged on the basis that they violate the value of equality.[64] It can be argued, however, that extending the fulls rights and obligations of marriage to unmarried couples who have chosen not to marry is inconsistent with the value of autonomy.

Same-sex couples, in contrast with opposite-sex couples, are excluded from the right to marry, and thus have a particularly strong claim of discrimination when they are not given the same rights and obligations as married couples.

In *Layland* v. *Ontario*, the majority of the Divisional Court ruled that the exclusion of same-sex couples from marriage does not violate the Charter guarantee of equality, but said: "Whether parties to homosexual unions should receive the same benefits as parties to a marriage, without discrimination because of the nature of their unions, is another question."[65] Several countries have introduced registered partnership laws that extend most marital rights and obligations to same-sex couples who choose to register. The registered partnership laws are intended to address the inequality of same-sex couples while also respecting the autonomy of those who choose not to register.

Some argue that extending marital rights and obligations to same-sex couples on the basis of cohabitation or registration does not fully address the problem of discrimination. The law excluding same-sex couples from marriage arguably conflicts with the value of equality by discriminating on the basis of sexual orientation or on the basis of sex.[66] Capacity to marry is a

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[64] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

[65] *Layland* v. *Ontario* (1993), 14 O.R. (3d) 658 (Div. Ct.)

[66] In *Layland* v. *Ontario* (1993), 14 O.R. (3d) 658 (Div. Ct.), Greer, J., dissenting characterized exclusion of same-sex couples from marriage as discrimination on the basis of

matter of exclusive federal legislative jurisdiction, but beyond the *Marriage (Prohibited Degrees) Act*, which outlines the rules about which relatives one may marry, the federal government has not addressed this issue in any significant way. Therefore, apart from the question of prohibited degrees, the common law continues to govern the essential validity of marriage, except in the province of Quebec, where the *Civil Code* applies.

There have been challenges to the prohibition against marriage by parties of the same sex, and the question of whether same-sex couples have or should have the right to marry has not been finally resolved.[67]

Several countries consider that their registered partnership laws, which enable same-sex couples to obtain all or most of the rights and obligations of marriage, are consistent with the value of equality. The Netherlands, however, is moving ahead with the legalization of same-sex marriage on the grounds that registered partnership is at best a "separate but equal" institution. Proponents of same-sex marriage in the Netherlands have cited the US Supreme Court decision in *Brown* v. *Board of Education*.[68]

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sexual orientation. In *Baehr* v. *Lewin*, 852 P.2d 44 (Haw. 1993), the Supreme Court of Hawaii ruled that it was, *prima facie*, discrimination on the basis of sex.

[67] A challenge to the exclusion of same-sex couples from was reported in "Gay Couple Fight for Marriage" *The Globe and Mail* (17 December 1998). Previous challenges have been unsuccessful: *Re North and Matheson* (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct.); *Layland* v. *Ontario* (1993), 14 O.R. (3d) 658 (Div. Ct.). A party who is not permitted to marry freely may also invoke s.7 of the *Charter*, which protects the right to life, liberty and security of the person. This argument was put forward in *Broddy* v. *Alberta*, [1982] A.J. No. 544 (C.A.), when the issue was whether an uncle and niece by adoption should be permitted to marry, but the court decided in favour of allowing the marriage on other grounds and did not address the *Charter* issue

[68] *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954).

In that case the court ruled that in the field of public education the doctrine of "separate but equal" had no place, and that racially segregated educational facilities were inherently unequal. Commenting on the effects of racially segregated classrooms on African-American public school children, the court said that this practice "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[69]

The same point could be made in relation to same-sex couples who have the option of registered partnership but not marriage. Even a registered partnership scheme that extends all marital rights and obligations could be challenged as inconsistent with the value of equality on the basis that it is a "separate but equal" institution.

B. Objectives

Procreation

Procreation is often identified as the primary function of and state objective in supporting marriage and often offered as a rationale for rejecting same-sex marriage. In *Layland* v. *Ontario*, e.g., the majority rejected the argument in favour of same-sex marriage on the grounds that

> One of the principal purposes of the institution of marriage is the founding and maintaining of families in which children will be produced and cared for, a procedure that is necessary for the continuance of the species. ... That principal purpose of marriage cannot, as general rule, be achieved in a homosexual union because of the biological limitations of such a union. It is this reality that is recognized in the limitation of marriage to persons of opposite sex. It is true that some married couples

[69] *Ibid.* at 494.

> are unable or unwilling to have children, and that the incapacity or unwillingness to procreate is not a bar to marriage or a ground for divorce.
> Despite these circumstances in which a marriage will be childless, the institution of marriage is intended by the states, by religions and by society to encourage the procreation of children.[70]

Although opposite-sex couples have a unique capacity to procreate, same-sex couples may have a child together by means of assisted reproductive technology, adoption or otherwise. As well, in some same-sex relationships there are children of former marriages or relationships. Justice Greer, dissenting in *Layland*, argued that any stigmatization experienced by such children would be lessened if the state were to extend recognition to the same-sex relationship.[71]

In any case, extending martial rights and obligations, or even marital status, to same-sex couples will not derail the state objective of encouraging procreation. Although some argue that extending marital rights and benefits to same-sex couples will somehow discourage marriage or undermine the family, Iacobucci J. has observed, "it eludes me how according same sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions."[72]

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[70] *Layland* v. *Ontario* (1993), 14 O.R. (3d) 658 (Div. Ct.).

[71] *Ibid.*

[72] Para. 211.

Stable and Nurturing Environments for Children

The laws of marriage and marriage-like relationships are aimed in part at providing a protected environment for the procreation, nurture and socialization of children. Children who are raised by their two biological parents have better outcomes than children raised by a single parent or by one biological parent and step-parent.[73] A report on the first cycle of Canada's National Longitudinal Survey on Children and Youth was released in 1996.[74] The survey includes more than 23,000 children from newborn to age 11. Using the survey data, researchers identified parental circumstances that are risk factors for children, including: parents with low levels of income, education, or social support; single or teenage parents; parents with four or more children; and parents who are depressed or dysfunctional. With regard to children of single-mother families, the report stated that they had higher rates of difficulties than children from two-parent families for emotional and behavioral problems as well as for academic and social difficulties.

The study's findings on difficulties associated with single-mother families raise the question of whether the state should continue to legally privilege marriage in order to encourage parties to enter into what is currently a more stable form of union

than opposite-sex cohabitation.[75] Given the trend of increasing rates of opposite-sex

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[73] Helen Sweeting, Patrick West & Martin Richards, "Teenage Family Life, Lifestyles and Life Chances: Associations with Family Structure, Conflict with Parents and Joint Family Activity" (1998) 12 International Journal of Law, Policy and the Family 15.

[74] Human Resources Development Canada/Statistics Canada, *Growing Up in Canada: National Longitudinal Survey of Children and Youth* (Ottawa: Statistics Canada, 1996).

[75] Nicole Marcil-Gratton, "Growing Up With Mom and Dad?" (Spring 1999) Transition 4

cohabitation, however, there may be a risk that failure to provide legal protections to those living in such relationships may leave any children of such unions at risk. Many marital rights and obligations are now extended to opposite-sex couples, and children born out of wedlock now have the same rights as "legitimate" children.[76] The extent to which remaining legal distinctions between marriage and opposite-sex cohabitation impose any burden on children should be considered. And the more substantial differences between the legal treatment of marriage and same-sex cohabitation should be reviewed in the same light.

Social Support System

Another objective of the laws underlying marriage and marriage-like relationships is to provide a social support system for family members. These relationships may indeed operate as such while the parties remain together, but are often ineffective in this regard on termination of a relationship. But the legal framework for protecting vulnerable persons on termination of non-marital relationships is uneven and in some cases non-existent.

Even for married persons, the extent to which a former partner is expected to provide support has declined. In the late 1980s, the Department of Justice conducted a study of divorce

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at 5-6; Pierre Turcotte and Alain Bélanger, "The Dynamics of Formation and Dissolution of First Common-law Unions" (1998) online: Statistics Canada http://www.statcan.ca/english/Vlib/Research/other9.htm.

[76] See, e.g., *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s.1(4).

cases and found very low levels of spousal support claims and orders:

> The first thing to be noted is that spousal support is rarely requested and even more rarely granted in the four courts for which we have information. While, on average, women are worse off than men following divorce and are often objectively in need of spousal support, a request for spousal support is indicated in only 16 percent of the 1,478 divorce files reviewed [in 1988] and in just under 19 percent of the 1,210 cases where there were dependent children. ... The Court files indicate that spousal support was explicitly incorporated into the divorce in only 6.2 of all completed divorce cases reviewed or, to put is another way, in 28 percent of cases where it was requested. This is a surprisingly low percentage.'[77]

An assumption underlying marriage and other conjugal relationships is that they are based on a division of labour in which one party, usually the female, carries the major responsibility for unpaid family tasks such as housework, child care, and care of sick and elderly family members.[78] A related assumption is that the assumption of major responsibility for family tasks is connected with some degree of financial dependence.

Thus, the law provides that on the breakdown of marriage or opposite-sex cohabitation, the financially dependent party may claim support from the other. It seems,

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[77] Canada, Department of Justice, *Evaluation of the Divorce Act* (Ottawa, 1990) at 74-76. The decision in *Moge* v. *Moge*, [1992] 3 S.C.R. 813 seemed to encourage more spousal support applications and awards, and perhaps has had some effect on the number of claims and orders.

[78] This assumption is born out by data from the 1996 census on hours spent on care of children, on housework, and on care of seniors: Statistics Canada (1998) online: http://www.statcan.ca.

however, that the extent to which marriage and marriage-like relationships actually operate as a social support system in this context is minimal.

Despite the continuing economic inequality of women, confirmed by 1996 census data,[79] and the persuasive arguments that marriage and marriage-like relationships exacerbate the inequality and vulnerability of women,[80] it seems there is a move away from the notion that a former partner should be responsible for spousal support. In part this is because of the increasing self-sufficiency among married women caused by high rates of labour force participation.[81] In this context, the value of individual autonomy may be overtaking the value of protecting the economically vulnerable. Even for those in traditional dependent

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[79] In 1996, male lone-parent families had an average income of $39,428, compared with $24,044 for female lone-parent families, and unattached males had an average income of $25,020, compared with $18,139 for females: 1996 census data Statistics Canada (1998) online:http://www.statcan.ca.

[80] See, e.g., Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989).

[81] Vanier Institute of the Family, *Profiling Canada's Families* (Ottawa, 1994) at 69.

relationships, however, there is some sense that protection of the vulnerable should be a responsibility of the state rather than that of the former partner and, but this is a matter of some current controversy.[82]

The other point to note is that marriage and marriage-like relationships may not only fail to operate as a social support system on termination of the relationships, but may exacerbate the inequality and vulnerability of women. The most important rules in this regard are those that operate on dissolution of relationships. Inequalities that operate *during* marriage may include giving priority to the man's job in family decision-making, the assumption by women of a double burden of waged labour and primary responsibility for child care and housework, and the sacrifice by women of their job goals to serve the family.

These inequalities do not flow from the legal rules governing intact relationships, but arguably the rules concerning relationship dissolution are implicated in the development of women's vulnerability and dependency within relationships.

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[82] See, e.g., *Bracklow* v. *Bracklow*, [1999] S.C.J. No. 14 (Q.L.) (in some circumstances there may be a continuing obligation to support a disabled former spouse, even in the absence of any compensatory or contractual basis for the claim to support – the marriage relationship along with the need of the applicant and ability to pay of the respondent may be the basis of an ongoing support order). This general debate is long-standing. See, e.g., *Messier* v. *Delage* (1983), 35 R.F.L. (2d) 337 (S.C.C.), where Lamer J., dissenting said that the economic need of an ex-wife is a social problem and the responsibility of the government rather than the former

In regard to property division, marital property laws in each province and territory and rules regarding unjust enrichment and constructive trust claims or, in Quebec, claims under the *Civil Code* based on partnership, contract or unjust enrichment provide at least some measure of relief for economically dependent parties on breakdown of a relationship. But these laws may have the perverse effect of encouraging dependency by holding out the promise of a share of property acquired during the relationship regardless of the relative financial contributions. A strict separate property regime might discourage the economic dependency of women. Perhaps by refusing to compensate a spouse who withdraws from the workforce to assume household and childcare responsibilities, a strict separate property regime would encourage each spouse to be economically independent. Susan Westerberg Prager, however, argues that property sharing should continue because of the gendered nature of work outside and within the home, and because spouses may continue to act altruistically during marriage, make selfless "irrational" choices, and then be left impoverished.[83] Also, the separate property regime with no sharing on separation discourages co-operation during marriage, because it rewards selfish choices and punishes behaviours such as withdrawing from the workforce to care for children.

Social Cohesion

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[83] Susan Westerberg Prager, "Shifting Perspectives on Marital Property Law" in Barrie Thorne, ed., *Rethinking the Family: Some Feminist Questions* (New York: Longman, 1982) 111 at 115.

Another objective of the laws underlying marriage and marriage-like relationships is social stability and social cohesion. Many commentators take the view that the family is the "cornerstone" of society, and that it is important to provide a protective legal framework for the family in order to ensure the strength and survival of a nation. Many commentators have stressed the symbolic value of state recognition of a relationship, and some draw an explicit link between this symbolic value and a sense of social cohesion. It is argued that state recognition enhances one's sense of citizenship and participation in society, regardless of whether it carries with it any material benefits.

In *Egan* v. *Canada*, L'Heureux-Dubé J. emphasized the symbolic value of being legally treated as a couple, saying:

> Official state recognition of the legitimacy and acceptance in society of a particular type of status or relationship in society of a particular type of status or relationship may be of greater value and importance to those affected than any pecuniary gain flowing from that recognition.[84]

And L'Heureux-Dubé J. elaborated on the connection between state recognition and a sense of social participation, saying:

> Although the claimants cannot be said to suffer any economic prejudice from the distinction since they are each entitled as individuals to a certain minimum income level, it cannot be overlooked that the rights claimants have been directly and completely excluded, as a couple, from any entitlement to a basic shared standard of living for elderly persons cohabiting in a relationship analogous to marriage.
>
> This interest is an important facet of full and equal membership in Canadian society. Given the marginalized position of homosexuals in society, the metamessage that flows almost inevitably from excluding same-sex couple from such an important social institution is essentially that society considers such relationships to be less worthy of

[84] *Egan* at para. 86.

respect, concern and consideration than relationships involving members of the opposite sex.[85]

Justice L'Heureux-Dubé was speaking of the symbolic value of having one's relationship recognized as analogous to marriage in the *Egan* case. But some regard such recognition as inadequate and advocate for the right to marry, in part because marriage is the supreme symbol of state recognition. "Legal marriage gives public recognition of a couple's commitment to each other."[86] Arguably, nothing equals marriage in this regard.

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[85] *Egan* at para. 90.

[86] Heather Joshi, "Marriage, Motherhood, and Old-age Security in the UK" in Mavis MacLean & Jacek Kurczewski, *Families, Politics, and the Law* (Oxford: Clarendon Press, 1994) 289.

III. MARRIAGE

> The tendency to reject marriage as a conjugal choice is evidently part of a social revolution, one of a series of rejections of institutions founded on a social order that is falling out of fashion... [87]

A. Demographic Background

In 1996, 87% of Canadians lived in family households, with "family" defined as "a now-married couple (with or without never-married sons and/or daughters of either or both spouses), a couple living common-law (again with or without never-married sons and/or daughters of either or both partners), or a lone parent of any marital status, with at least one never-married son or daughter living in the same dwelling." There were 5.8 million married couple families in Canada in 1996, an increase of 1.7% from 1991. The proportion of families that were married couple families fell from 80% in 1986 to 74% in 1996.[88]

There has been an increase in the percentage of Canadian marriages that are remarriages. In the 1950s and 1960s, 90% of marriages involved single persons, and less than 10% were of widowed or divorced persons. By 1991, just over 75% of all marriages involved

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[87] Jean Dumas & Alain Belanger, "Report on the Demographic Situation in Canada 1996" in *Current Demographic Analysis* (Ottawa: Statistics Canada, 1997) at 178.

[88] From the 1996 census data Statistics Canada (1998) online:http://www.statcan.ca, in particular "Population in Private Households, Showing Living Arrangements, 1996 Census" and "1996 Census: Marital Status, Common-law Unions and Families."

two single persons, and about 20% involved previously divorced persons. The proportion of marriage involving widowed persons has declined. It has been estimated that in 1990 about 7% of families currently raising children included at least one step-child.

The average duration of marriage has decreased. Because of high divorce rates, the increase in remarriages, and the older age at first marriage, the marriages of those born in the late 1950s are expected to be an average of seven years shorter than the marriages of those born in the 1920s. In 1995 there were about 78,000 divorces, more than twice the number in 1971. The divorce rate in Canada peaked in 1987, and has slowly declined since.

Both parents work outside the home in most families. The labour force participation rate of married women rose from 5% in 1941 to 61 % in 1991.[89] In 1990, both parents were employed in 70% of families with children under the age of 19.[90] In 1992, 63% of mothers with children under the age of 6 worked outside the home.[91] The participation of married women in the labour force has a significant effect on family incomes. In 1994, the average income of married couples with no children and with only one earner was $43,678, while the average income of those with two earners was $61,489.

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[89] Vanier Institute of the Family, *Profiling Canada's Families* (Ottawa, 1994) at 69.

[90] *Ibid.* at 71.

[91] *Ibid.* at 73.

For married couples with children under the age of 18, the average income of those with one earner was $45,572, and for those with two earners was $63,112.

B. Functions of Marriage that the State has an Interest in Supporting

Marriage confers a legal status from which rights and obligations flow. It remains a legally privileged institution, although some of the rights and obligations traditionally connected with marriage are no longer exclusive to that relationship, as shown in appendices A through D. In his annotation to *Peter* v. *Beblow*,[92] a case that seemed to collapse distinctions between married and unmarried couples by awarding an unmarried woman a share of her former partner's property under the doctrine of unjust enrichment that was very close to what she would have received under the provincial marital property legislation, James McLeod wrote:

> Either marriage is an institution worthy of protection or it is not. When society wishes to encourage an institution, in this case marriage, it provides rights to promote it and withholds rights from those who are against it, i.e., those living in common law relationships.

As McLeod suggests, the question is whether the state has a sufficient interest in the institution of marriage to justify the extension of special rights to promote it. Does the institution of marriage fulfil the objectives underlying the law outlined Chapter II above, i.e., procreation, nurture and socialization of children; providing a social support system; and promoting social cohesion? Do the functions of marriage justify legal privileges? Is marriage uniquely capable of fulfilling particular state objectives?

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[92] *Peter* v. *Beblow*, [1993] 1 S.C.R. 980.

This part begins with further consideration of the issue of procreation.

As noted above, procreation has long been identified as the central purpose of marriage. In his unfinished 16th-century treatise in matrimony, Henry Swinburne wrote that "matrimony was therefore ordeined that by procreacion of children the number of ye elect might be accomplished" and that "the chiefe and prinicpall end of matrimonie is procreation of children and avoyding of fornication."[93] The notion that procreation is the central purpose of marriage continues to be espoused,[94] and many courts have denied the same-sex couples the right to marry on that basis.[95] Procreation has never been limited to marriage, however, and in recent years there has been a "huge increase" in the number and proportion of babies born to woman who are not married.[96] As well, marriage does not necessarily lead to procreation.

Although procreation can take place outside of marriage, some continue to take the view that reproduction within marriage is preferable and worthy of special support. In 1995, four justices of the Supreme Court of Canada identified procreation as the ultimate purpose of marriage, and went on to say that marriage deserved special state support.

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[93] Quoted in Sheila Doyle, "An Uncompleted Work by Henry Swinburne on Matrimony" (1998) 19 Legal History 162 at 166 and 169 (spelling as in original).

[94] For example, natural law theorist John Finnis has argued that the procreative aspect of intercourse within marriage impresses marriage with a moral sanctity that is absent from other sexual relationships. John Finnis, "Law, Morality, and 'Sexual Orientation'" (1994) 69 Notre Dame Law Review 1049 at 1066-67.

[95] *Layland* v. *Ontario* (1993), 14 O.R. (3d) 658 (Div. Ct.); *Singer* v. *Hara*, 522 P.2d 1187 (Wash. App. 1974).

[96] Vanier Institute of the Family, *Profiling Canada's Families* (Ottawa, 1994) at 58.

Justice La Forest, writing for himself and three of the other four judges who made up the majority in *Egan* v. *Canada*, said

> [M]arriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. ... The legal institution of marriage exists both for the protection of the relationship and for defining the obligations that flow from entering into a legal marriage. Because of its importance, legal marriage may properly be viewed as fundamental to the stability and well-being of the family and, as such, ... Parliament may quite properly give special support to the institution of marriage.[97]

Putting aside Finnis's moral argument, which is inconsistent with the values and practices of most Canadians, the notion that marriage functions as a specially protected and superior locus for the procreation and nurture of children requires further consideration.

Justice La Forest's point that heterosexual couples have the unique ability to procreate is strictly true in the sense that a male sperm and a female egg are required, but, as noted above, adoption and new reproductive technologies allow both same-sex couples and opposite-sex couples to add children to their families. And children of former relationships may be raised within a newly formed same-sex or opposite-sex relationship. Procreation and nurturing of children may take place within an opposite-sex relationship.

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[97] *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at paras. 22 and 23.

Justice La Forests' point that marriage is legally structured to protect the relationship is echoed by Laurence Houlgate, who argues that:

> [T]he advantage of marriage to the adults who bear the child is that their contract with each other guarantees that the legal duties of child support and nurture be a joint responsibility. Although the marriage contract does not stipulate the allocation of the burdens of child-rearing, both parents are legally required to support and maintain their children until the age of eighteen years.[98]

Houlgate acknowledges that unmarried parents are also legally required to support their children, but comments that "most unmarried mothers bear the entire burden of child-rearing."[99] It is important, however, to take into account the demographic changes that have taken place in the last decade, i.e., the increase in children born to unmarried couples in stable unions, and the fact that the legal distinctions between marriage and opposite-sex cohabitation have diminished significantly. The legal privileges of marriage that remain could be extended to other families with children, so that procreation and nurturing children outside of marriage would be as legally protected as within marriage.

But marriage is a more stable relationship than unmarried cohabitation.[100] Therefore, the state may be justified in providing special privileges for married couples in order to encourage and support this more stable family form.

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[98] Laurence D. Houlgate, *Family and State: The Philosophy of Family Law* (Totowa: Rowman & Littlefield, 1988) at 66.

[99] *Ibid.*

[100] Nicole Marcil-Gratton, "Growing Up With Mom and Dad?" (Spring 1999) Transition 4 at 5-6; Pierre Turcotte and Alain Bélanger, "The Dynamics of Formation and Dissolution of First Common-law Unions" (1998) online: Statistics Canada http://www.statcan.ca/english/Vlib/Research/other9.htm.

Family stability is an important aspect of the healthy nurturing of children.

Other traditional functions of marriage were, first, to serve as a life-long union between man and wife and, second, to serve as a mechanism for the transfer wealth.[101] With the shift from marriage as a public obligation to marriage as matter of individual choice to be formed or dissolved in accordance with the personal wishes of each spouse, these traditional functions of marriage receded into the background. More recent formulations of the functions of marriage include: "bearing and rearing children, a division of labour between husband and wife, a pooling of resources, regulation of property, regulation of sexuality, and the provision of emotional and economic stability."[102]

Most of the current functions of marriage may be fulfilled within marriage-like relationships and should more appropriately be called "functions of the family." Researcher Shirley Zimmerman gives the functions of the family as: physical maintenance and care of family members; additions of new members through procreation or adoption and their relinquishment when mature; socialization of children for adult roles, social control of members and the maintenance of order within the family and groups external to it;

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[101] Gérard Vincent, "A History of Secrets?" in Antoine Prost & Gérard Vincent, eds., *Riddles of Identity in Modern Times* in *A History of Private Life*, Vol. 5, (Cambridge: Harvard UP, 1991) 145 at 212.

[102] Heather Joshi, "Marriage, Motherhood, and Old-age Security in the UK" in Mavis MacLean & Jacek Kurczewski, *Families, Politics, and the Law* (Oxford: Clarendon P, 1994) 289.

maintenance of family morale and motivation to ensure task performance both within the family and in other groups; and production and consumption of goods and services.[103] None of these functions is exclusive to marriage and all may be fulfilled by family forms other than marriage.

Eva Rubin also identifies the social needs fulfilled by families and points out that "many of the alternate family forms perform more than one of these functions, yet the law has been slow to characterize them as families." Rubin's list of social needs is comprised of ... provision of secure relationships for sexual activity and procreation, provision of an environment suitable for child-rearing, creation of small, self-sufficient economic units, supplying of psychological and emotional support, and provision of care in sickness and old age.[104]

Laurence Houlgate ascribes to the family a shorter list of functions. Noting that most traditional functions of the family have been shifted to institutions such as schools, public hospitals, and prisons, he concludes that the only functions of the family that remain are "providing for the biological survival of infants and young children" and satisfying "the profound psychological need of both adults and children for intimate relationships."[105]

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[103] Cited in The Vanier Institute of the Family, *Profiling Canada's Families* (Ottawa, 1994) at 12.

[104] Eva R. Rubin, *The Supreme Court and the American Family* (New York: Greenwood Press, 1986) at 155.

[105] Laurence D. Houlgate, *Family and State: The Philosophy of Family Law* (Totowa: Rowman & Littlefield, 1988) at 30-35 and 43.

Marriage also functions as a contract, a formal agreement to the rights and obligations associated with marriage. This function is peculiar to marriage. Although those in marriage-like relationships may enter into contracts that provide for rights and obligations associated with marriage or go through processes such as designating a partner as the beneficiary of an insurance plan, there is no formal process similar to marriage under which cohabitants agree to marital rights and obligations.

But such rights and obligations have been extended to unmarried couples simply on the basis of cohabitation for the requisite period or other qualifying circumstances, and some object to this as an unjustified interference with the autonomy of parties who may have chosen not to marry in order to avoid responsibility to their partners.[106]

Another function of marriage that is not fulfilled by other relationships is the public registration of a union. As Wendy Adams puts it, "marital status is used by the state as a formal criterion in regulating a comprehensive system of entitlements and obligations."[107] Because marriage is a public event that requires civil registration, there is no uncertainty about marital status. The formalities surrounding the formation of marriage include measures – the publication of banns or the issue of a license – to ensure that there are no impediments to the marriage and that the marriage is not "clandestine."

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[106] See, e.g., James McLeod, "Annotation," *Taylor* v. *Rossu* (1998) 39 R.F.L. (4th) 242 at 246 (Alta. C.A.).

[107] Wendy A. Adams, "Same-sex Relationships and Anglo-Canadian Choice of Law: An Argument for Universal Validity" (1996) 34 The Canadian Yearbook of International Law 103 at 105.

The public and certain nature of marriage today contrasts with the uncertainty that reigned when marriages were formed according to customary, legal, or religious requirements.[108]

Laurence Stone writes:

> It is not too much to say that the marriage law as it operated in practice in England from the fourteenth to the nineteenth century was a mess. The root cause of the trouble was that there was no consensus within the society at large about how a legally binding marriage should be carried out. Popular custom took one position, the church another, and the state and the propertied laity a third. ... The result was a condition of moral and legal confusion which appeared to many thoughtful contemporaries from the sixteenth to the nineteenth centuries to maximize insecurity, misery, and disappointment.[109]

Legal rules setting out the requirements of a valid marriage, including restrictions on the persons who were qualified to perform marriages and requiring the civil registration of marriages substantially reduced the "insecurity, misery, and disappointment" connected with uncertainty.

One of the problems associated with the era of uncertain marriage has been revived because marriage is no longer a prerequisite for many of the benefits, rights, and obligations traditionally associated with that status.

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[108] See Robert Dingwall & John Eekelaar, "Families and The State: An Historical Perspective on the Public Regulation of Private Conduct" (1988) Law & Policy 341 at 343: "[M]arriage itself was an ill-defined legal status until the passage of Lord Hardwicke's Act in 1753. The validation of a relationship as a marriage involved three potential audiences – the church, the state and the local community – each of which could use different criteria. If marriage was informal, so was its dissolution. Couples could simply go their own ways without involving anyone else unless there was a dispute."

[109] Lawrence Stone, *Uncertain Unions and Broken Lives* (Oxford: Oxford UP, 1995). See also Frances and Joseph Gies, *Marriage and the Family in the Middle Ages* (New York: Harper & Row, 1987).

The problem is multiple claimants to the status of "spouse" in relation to one person.

Claims based on extra-marital relationships for a share of property[110] or for spousal support[111] raise the difficult issue of how to reconcile the claims of a party who seems to qualify as a "spouse" under extended definitions of that term with those of a legally married spouse who cohabited with the defendant throughout the extra-marital affair and who may not have known about the existence of the "third party."

C. Legal Rules Governing Marriage

The legal rules governing marriage and marriage-like relationships are set in chart form in Appendix A. In this part of the paper I set out the constitutional framework governing marriage. As well, the legal rules peculiar to marriage will be discussed here, that is, the legal rules relating to the formation of marriage, with the focus on the issue of who is permitted to marry.

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[110] *De L'Isle* v. *Carton*, [1997] Q.J. No. 1693 (Q.C.A.) (Q.L.), application for leave to appeal dismissed with costs 4 December 1997, [1997] S.C.C.A. No. 451 (Q.L.); *Nowell* v. *Town Estate*, leave to appeal granted March 19, 1998, [1997] S.C.C.A. No. 642 (Q.L.).

[111] *Mahoney* v. *King*, [1998] O.J. No. 2296 (Gen. Div.) (Q.L.).

The *Constitution Act, 1867*, s.91(26) gives the federal Parliament the power to make laws in relation to "marriage and divorce."[112] Parliament has exclusive jurisdiction over all aspects of marriage except the rules regarding solemnization of marriage. Parliament's exclusive jurisdiction over marriage includes authority over the essential validity of marriage, i.e., the capacity of parties to marry, and the recognition of foreign marriages. As well, Parliament has exclusive jurisdiction over all aspects of divorce. Parliament has legislative jurisdiction over spousal and child support, and over child custody and access, when those issues arise in the context of divorce, and the federal *Divorce Act* addresses those issues. The *Divorce Act* does not attempt to exercise authority over property division on divorce (although it does provide for lump-sum support).

It is possible that Parliament does have legislative jurisdiction over property division in the context of divorce, but it has not passed legislative in this area. Parties seeking a divorce therefore apply for property division under provincial legislation.

The *Constitution Act*, s. 92(12) gives provincial legislatures the power to make laws in relation to "the solemnization of marriage in the province." This means that the provinces have exclusive jurisdiction over the formal validity of marriage. The *Constitution Act*, s.92(13) gives the provinces the power to make in relation to "property and civil rights" in the province. Pursuant to s.92(13), the provinces have legislative jurisdiction over marital property, spousal and child support, child custody and access, and most aspects of succession law.

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[112] *Constitution Act, 1867*, UK, 30 & 31 Victoria, c.3.

Canada's Parliament has not has not enacted comprehensive legislative governing the capacity to marry or recognition of foreign marriages. In 1990 Parliament enacted a statute on the prohibited degrees of consanguinity and affinity, which substantially reduced the restrictions on marrying relatives,[113] but other aspects of the capacity to marry and the rules governing recognition of foreign marriages are not the subject of legislation. For the issues relating to capacity to marry or recognition of foreign marriages that are not addressed by federal legislation the law individualize more government benefits in force in each province prior to its admission to Canada continues to apply, until repealed or amended by Parliament.[114] In the result, the civil law governs in Quebec, and the common law in the other provinces.

The *Civil Code* in Québec and the common law in the other provinces restrict marriage to opposite-sex couples.[115] This restriction has been challenged unsuccessfully in the past, and there is currently at least one challenge to the restriction of marriage to opposite-sex couples ongoing in Quebec.[116]

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[113] *Marriage (Prohibited Degrees) Act*, S.C. 1990, c.46.

[114] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s.129.

[115] The *Civil Code of Quebec*, S.Q. 1991, c.64, article 365 provides: "Marriage may be contracted only between a man and a woman expressing openly their free and enlightened consent." For a ruling on the common law, see *Layland* v. *Ontario* (1993), 14 O.R. (3d) 658 (Div. Ct.).

[116] See "Gay Couple Fight for Marriage" *The Globe and Mail* (17 December 1998), reporting on a challenge to the restriction of marriage to opposite-sex couples by Michael Hendricks and René Leboeuf. *The Globe & Mail* reports that their case is before both the Québec human-rights commission and the Québec Superior Court. As well, the *Canadian Press Newswire* reported on 6 January 1998 that Martin Dubé had launched a suit in the Québec Superior Court

The applicants are arguing that the restriction on marriage violates the Quebec *Charter of Rights and Freedoms*.[117] If the applicants are successful, a question may arise as to whether a Quebec same-sex marriage would be recognized in the rest of Canada. But any apparent difference in the law of Quebec and in that of the rest of Canada would be short-lived, because any ruling in favour of same-sex marriage would be appealed to the Supreme Court of Canada, which has general appellate jurisdiction and deals with cases of federal law and provincial law.[118] A Supreme Court of Canada ruling on same-sex marriage would undoubtedly enunciate the law of Canada on this issue, regardless of whether it was an appeal from a common law jurisdiction or from Quebec.

It is not clear that a *Charter* challenge to the prohibition against same-sex marriage would be successful, but it is at least arguable that the common law definition of marriage (or in Quebec the *Civil Code* definition of marriage), which is the basis of the government action

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to challenge the government's refusal to permit his same-sex marriage, arguing that the refusal violated his rights under Québec's human rights legislation. According to this report, Dubé's partner, Manuel Gambora, had to return to Mexico in November 1997 when his visitor's visa expired.

[117] *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. c-12, s.10.

[118] And because the Supreme Court of Canada is the final court of appeal for matters of both federal and provincial law and would certainly grant leave to appeal any ruling by a provincial appellate court in favour of same-sex marriage (in contrast with the situation in the United States, where the Supreme Court of Hawaii is the final court of appeal in *Baehr* v. *Miike*, 1996 WL694235 (Haw.Cir. Ct.), no question arises as to whether the province of Québec, or any other province, could "bind the world" or even the rest of Canada. See Linda Silberman, "Can the Island of Hawaii Bind the World? A Comment on Same-sex Marriage and Federalism Values" (1997) 16 Quinnipiac L. Rev. 191.

of refusing to grant same-sex couples a marriage licence,[119] discriminates on the basis of sexual orientation contrary to s.15 of the *Charter*.

Because of the constitutional division of powers, the federal government has the exclusive jurisdiction to enact legislation allowing same-sex marriage.[120]

If the federal government were to enact such a law, it would have effect throughout Canada. Provincial laws that affect married couples, e.g., marital property laws, would apply equally to same-sex and opposite-sex marriages, and any attempt to exclude married same-sex couples from a legislative scheme applicable to married persons would presumably constitute discrimination under s.15 of the *Charter*.

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[119] In *RWDSU* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, the Supreme Court of Canada ruled that the *Charter* applies to the common law only in so far as it is the basis of some government action which infringes a guaranteed right or freedom. Even where the *Charter* is not directly applicable, the common law must be interpreted in a manner that is consistent with *Charter* values: *Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

[120] For a general discussion of the federal marriage power that does not address the issue of same-sex marriage, see Leslie Katz, "The Scope of Federal Legislative Authority in Relation to Marriage" (1975) 7 Ottawa Law Review 384. Wendy A. Adams speculates about the federal marriage power in relation to same-sex marriage in "Same-sex Relationships and Anglo-Canadian Choice of Law: An Argument for Universal Validity" (1996) 34 The Canadian Yearbook of International Law 103

The federal government also has exclusive jurisdiction to enact laws relating to the recognition of foreign marriages but has not exercised its power to do so. In light of the plan of the Netherlands to legalize same-sex marriage by 1 January 1999, the question of recognition of foreign same-sex marriages should be addressed. It is arguable that under our current laws a foreign same-sex marriage would be recognized,[121] but this is by no means clear.[122] Federal legislation providing for the recognition of foreign same-sex marriages would eliminate the need for court proceedings to resolve the issue. Resolution of this issue as part of a comprehensive legislative strategy to deal with marriage and marriage-like relationships would be preferable to leaving it to the courts to decide.

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[121] Martha Bailey, "How Will Canada Respond to Same-sex Marriage?" (1998) 32 Creighton Law Review 105.

[122] Donald J. MacDougall, "Marriage Resolution and Recognition in Canada (1995) 29 Family Law Quarterly 541 at 546.

IV. MARRIAGE-LIKE RELATIONSHIPS

Over the past twenty years, the number of married couples living with their own minor children has decreased significantly. This decrease has been accompanied by a sharp rise in single parenting, stepparenting, and unmarried cohabitation among both heterosexuals and homosexuals. Although the legal system has begun to recognize these demographic changes, the definitions of "family," "spouse," and "parent" in many legal contexts still encompass only the traditional nuclear family and its members. As a result, nontraditional "families" are often denied important benefits associated with legal family status.[123]

A. Opposite-sex Cohabitation

The 1996 Census Dictionary uses the term "common-law status" for two people of the opposite sex who live together as husband and wife but who are not legally married to each other.[124] "Common-law status" was not measured in the census prior to 1981, but data on that measure is available for 1991 and 1996, and for 1986 and 1981, those living "common-law" were included among the "married" population.

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[123] "Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family" (1991) 104 Harvard Law Review 1640.

[124] The statistical information on opposite-sex cohabitation is from the 1996 census data available at Statistics Canada, (1998), online: http://www.statcan.ca, unless otherwise indicated.

I use the term "opposite-sex cohabitation" rather than "common-law status," because of the confusion that may arise in regard to the latter term.[125]

In 1996, 14% of all cohabiting opposite-sex couples were unmarried, up from 6% in 1981. Quebec had the highest level of opposite-sex cohabitation, with 24% of all opposite-sex couples living together outside of marriage. Of all family structures, growth was strong among opposite-sex couples. Between 1991 and 1996, growth was fastest in New Brunswick and the Northwest Territories, and there were also large increases recorded in Newfoundland, P.E.I., Quebec, and the Yukon. Turcotte and Bélanger concluded that "for Canadian women, and especially Quebec women, living common law is now the preferred conjugal state for their first union."[126]

Turcotte and Bélanger analysed the various factors affecting rates of opposite-sex cohabitation. One of their findings is that women who had experienced the separation of their parents before the age of 15 were 80% more likely to have cohabitation rather than marriage as their first conjugal experience as those who had not.

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[125] The confusion arising from the inaccurate use of the term "common law marriage" to describe opposite-sex cohabitation is canvassed fully in *Keddie* v. *Currie*, (1991), 85 D.L.R. (4th) 342 (B.C.C.A.). In contrast with opposite-sex cohabitation, common law marriage is a marriage valid at common law that can be dissolved only by death or divorce.

[126] As well, the discussion here is based and on Pierre Turcotte and Alain Bélanger, "The Dynamics of Formation and Dissolution of first Common-law Unions" (1998) online http://www.statcan.ca/english/Vlib/Research/other9.htm (Statistics Canada).

They also examined the stability of opposite-sex cohabitation and found that such unions are relatively brief in Canada as a whole, although somewhat less so in Quebec.

They reported that in the large majority of cases where an opposite-sex union ends, either in separation or marriage, this occurs in the first five years of cohabitation. Outside Quebec, 75% of women are no longer living with their first partner after five years (for Quebec women it is 60%).

Turcotte and Bélanger found that opposite-sex unions formed in the early 1990s lasted no longer than those formed in previous decades and in fact were more likely to end quickly in separation rather than in marriage. Thus, opposite-sex unions are used less frequently now as a prelude to marriage. They also found that those women who do marry their first opposite-sex partner are ten times less likely to separate, commenting, "This clearly shows the stabilizing influence of marriage on the duration of first unions that began as common-law unions. This is the variable with by far the greatest influence on the risks of separation for women who have experienced a first union outside of marriage."[127]

The study conducted by Turcotte and Bélanger indicates relatively low levels of stability in first opposite-sex unions and perhaps less commitment to such relationships than to marriage. This could support arguments in favour of legally privileging marriage in order to encourage couples to enter into a more stable form of relationship. But the steadily increasing levels of opposite-sex cohabitation even in the face of a relative lack of legal protection suggest that a goal of promoting marriage as a first conjugal union may be unrealistic.

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[127] *Ibid.*

Even if one is unconcerned about encouraging young people to marry rather than live with a partner, however, the short-term and apparently less committed nature of first opposite-sex unions might suggest that attaching the full range of marital rights and obligations to them is inappropriate.

B. Same-sex Cohabitation

Same-sex cohabitation is not included in Canada's census data. The "family" is constructed as an institution for opposite-sex couples or for parents and children by Statistics Canada, and same-sex couples are rendered invisible. Without accurate information on the numbers of same-sex couples who are cohabiting and who would be eligible for an expanded regime of "marital" rights and obligations, law makers are unable to make informed decisions. Statistics Canada should in the future collect information on same-sex couples and their financial circumstances, but its failure to do so to date should not excuse governments from proceeding with needed reforms.

Some legislators have been willing to exclude same-sex couples from "marital" rights and obligations without accurate information. Florida, for example, went ahead with "defense of marriage" legislation that would free the state from any obligation to recognize a foreign same-sex marriage even though they were unable to ascertain the financial impact – legislative staffers said they could find no reliable data to assess the percentage of the population that would avail itself of same-sex marriage if it were to become legal.[128]

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[128] Michael J. Kanotz, "For Better or for Worse: A Critical Analysis of Florida's Defense of Marriage Act" (1998) 25 Florida State University Law Review 439 at 446.

In this country, the federal government successfully resisted a claim for extension of pension benefits to same-sex couples on the basis of evidence on costs that dissenting judges in *Egan* v. *Canada* characterized as "highly speculative and statistically weak."[129] Of course, Florida and Canada were denying recognition to same-sex couples. Legislators interested in extending recognition to same-sex couples will need to give more attention to determining the numbers of same-sex couples and their financial circumstances in order to do a cost/benefit analysis of any reforms. Below is some information gleaned from Canada's census data, as well as data gathered in other countries and some discussion of cost/benefits analysis of employment benefits for same-sex partners.

In Canada, census "families" are divided into those formed by couples and those headed by a lone parent. Married or "common-law" couples are considered a family whether they or not they have a child living with them. "Common-law" couples include those of the opposite sex only. A lone parent living with one or more never-married sons or daughter also constitutes a family.

Thus, same-sex couples without a child are excluded from the definition of "family" by the Canadian census, although same-sex couples with a child would be considered a census family by virtue of the parent-child relationship[130]

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[129] *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at para. 193.

[130] "1996 Census: Marital Status, Common-law Unions and Families," Statistics Canada, (14 October 1997), online: http://www.statcan.ca.

Although same-sex couples are not counted in the census it is possible to extrapolate to some extent from Statistics Canada data. According to the 1996 census, there were roughly 25 million persons living in "family" households, 240,289 of whom were "non-family persons living with non-relatives only." This category could include persons living with a same-sex partner with a child (the same-sex partner and child make it a "family" household).[131] Of the roughly 4 million persons living in "non-family" households, 777,605 were "living with one or more non-relatives only." It is possible that some of these persons were living with a same-sex partner. Adding together the "non-family persons living with non-relatives only" in a family household and the persons "living with one or more non-relatives only" in a non-family household, the total is just over 1 million persons. Assuming that every one of these persons was living with a same-sex partner, which is unlikely, only about 3% of Canada's population was living with a same-sex partner in 1996.[132]

Roughly the same result was reached in the Netherlands prior to the enactment of a registered partnership law, which came into force on 1 January 1998.

This law allows unmarried couples of the same or opposite sex to register and thereby attain most "marital" rights and obligations.

In 1996, M.M. Croes reviewed the available data and wrote:

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[131] Also included in this category would be any person living with a never-married same-sex partner and the partner's parent. The never-married partner and the partner's parent would make it a family household.

[132] I have assumed that relatives would not be same-sex partners. To the extent that relatives were living as same-sex partners the percentage could be higher.

In 1996, M.M. Croes reviewed the available data and wrote:

> Little is known about the number of homosexuals in general and about homosexual couples in particular. In the so-called continuous population system information has been collected on all persons in the Netherlands who do not live in a family context. On the basis of a number of assumptions an estimated total of 21.3 thousand couples have been found who may have a homosexual relationship and who are living at the same address. Three out of five of these couples consist of males. Only 2 thousand couples, mostly females, live with one or more children. Half the number of all same-sex couples without children live in the highly urbanized municipalities. These findings correspond with studies on the prevalence of homosexuality."[133]

The population of the Netherlands is about 15.5 million,[134] so even by Croes's generous estimates less than 3% of the population was living with a same-sex partner. When the Netherlands' registered partnership law came into force on 1 January 1998, same-sex couples were permitted to obtain most "marital" rights and obligations through registration. During the first 10 months of 1998, 2,798 same-sex couples registered, only about 1.3% of the estimated number of same-sex couples. In Denmark, where registered partnership for same-sex couples only has been available since 1989, a total of 7,082 persons had registered as at 31 December 1997, out of a population of 5.3 million.[135]

The USA collects some data on same-sex couples. Craig Christensen discussed the categories used by the American Bureau of the Census and discussed the data collected by that

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[133] M.M. Croes, "Samenwomers van gelijk geslacht" ["Same-sex cohabitation"] (October 1996) *Maandstatistiek van de Bevolking*.

[134] The Economist, *Pocket World in Figures* (London: Profile Books, 1998) at 14.

[135] Danish partnership statistics are available online: www.lbl.dk/partstat.htm. Denmark Statistics calculate the number of registered partners based on information regarding marital status they receive from the Civil Registration System, and only Danish citizens have been counted. Denmark Statistics suggest that the actual number of persons who are registered might be 10 to 25% higher.

agency in the census, which is conducted every 10 years, and in the periodic Current Population Survey.[136] He pointed out that the Census Bureau added a new "unmarried partner" category to the 1990 decennial census. This category has been used in the periodic surveys as well. The unmarried partner category includes both same-sex and opposite-sex living arrangements, and was intended to identify "a person who is not related to the householder, who shares living quarters, and who has a close personal relationship with the householder."[137] There is some doubt as to whether the data collected by the Census Bureau are an accurate tally of same-sex couples because of confusion about the category's definition and because of predictions that many citizens would not provide the required information.[138] However, the information collected by the Census Bureau provides at least a rough measure of the rates of unmarried opposite-sex and same-sex cohabitation.

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[136] Craig W. Christensen, "Legal Ordering of Family Values: The Case of Gay and Lesbian Families" (1997) 18 Cardozo Law Review 1299.

[137] USA Department Of Commerce, Bureau Of The Census, Current Population Reports,"Marital Status And Living Arrangements: March 1993," Series P-20, No. 478 at vii.

[138] Craig W. Christensen, "Legal Ordering of Family Values: The Case of Gay and Lesbian Families" (1997) 18 Cardozo Law Review 1299 at 1313-14.

According to the Census Bureau's Current Population Survey of March 1997, there were about 101 million households in America, with "household" defined as "a person or group of people who occupy a housing unit." Of this total, about 5.9 million households were comprised of unmarried "partners" of the same or opposite sex, compared with about 55.3 million married couples living together. Of the unmarried partner households, about 4.1 million were comprised of two unrelated adult partners of the opposite sex, and almost 1.8 million were comprised of unrelated adult partners of the same sex. Of the same-sex partner households, about 1 million were male partner households, and 805,000 were female partner households. There were children under the age of 15 in 22,000 (2.2%) of the male-partner households and in 110,000 (14%) of female-partner households.[139] In summary, less than 2% of all American households in 1997 were same-sex couple households, and children under 15 were present in about 7% of those same-sex couple households.

Another source of demographic information is cost/benefit analysis undertaken by employers who are considering extending benefits to the same-sex partners of employees.

Robert Blum has noted that an increasing number of employers are offering such benefits because of competitive pressures and because the additional costs are minimal –

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[139] USA Department Of Commerce, Bureau Of The Census, Current Population Reports, "Marital Status And Living Arrangements: March 1998" Series P-20, No. 506 at 71-73 and No. 509 at 1-2 (online) http://www.census.gov/population/www/socdemo/ms-la.html. Also online, see the report for 1998, which indicates that there were 5.9 million unrelated partner households, of which 1.7 million were same-sex partner households. The 1998 report does not provide an aggregate of households: USA Department Of Commerce, Bureau Of The Census, Current Population Reports, "Marital Status And Living Arrangements: March 1998" Series P-20, No. 514 at 71-74.

"Employers often now find that they can get substantial value for small additional dollar expenditure."

[140] Blum summarized the reasons of employers for granting these benefits, saying that these benefits bring value to employers because: a) meet the competition for employees; b) enhance recruiting and retention; c) enhance the employer's equal opportunity and/or diversity programs; d) improve morale; e) improve productivity; f) create economic fairness as between employees with different lifestyles.[141]

With regard to cost, Blum wrote that the cost for health coverage, the most common benefit, is not significant on a per person covered basis, explaining:

> The additional cost is directly proportional to the number of additional persons covered and does not have a material relationship to the fact that the persons covered are not spouses, but are domestic partners. The usual estimate given is that the additional cost from domestic partner benefits is about 0.5% to 1.5% of overall health benefits cost. Perhaps the best evidence is that many insurers and HMOs do not impose a premium surcharge for this coverage.[142]

Blum explained that low costs followed from low enrollment, and that enrollment in the plans was low because: a) employees do not want to reveal confidential information; b) the value of coverage usually is taxed thereby reducing the value of the benefit;

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[140] Robert A. Blum, "Domestic Partner Benefits: Issues and Planning" (25 March 1998) SC62 American Law Institute-American Bar Association, ALI-ABA Course of Study Materials 387 at 389.

[141] *Ibid.* at 390. Blum characterized the elimination of discrimination as creating value for the employer by enhancing diversity programs, improving morale, and creating fairness. Justice L'Heureux-Dubé took a similar view but in the reverse in *Canada* v. *Mossop*, [1993] 1 S.C.R. 554, where she pointed out that the social cost of failing to eliminate discrimination against same-sex couples is high.

[142] *Ibid.* at 390-91.

and c) partners often work and have coverage with their own employers. On the basis of available data, Blum stated that when same-sex partner benefits are provided, enrollment goes up about 1% and when opposite-sex partner benefits are also offered, enrollment goes up about 3%.[143]

C. Non-conjugal but Affective and Interdependent Relationships Between Adults

The Canadian census does not count the number of adults living in non-conjugal but affective and interdependent relationships. Potential numbers of non-family adults living together in non-conjugal relationships can be gauged from census data, but whether these adults live in affective and interdependent relationships cannot be determined. While claims related to those in conjugal relationships are in part based on the nature of the relationship, for this group claims for extending marital rights and obligations are based almost completely on the fact of dependency and the principle of protecting the vulnerable. Thus, in compiling data on this group, the dependency aspect of the relationship should be the focus.

D. Functions of Marriage that are Fulfilled by Marriage-like Relationships

Marriage-like relationships fulfil many of the same objectives as marriage but are not given the same level of legal support. The government has same interest in support marriage-like relationships that nurture children, that provide a social support system at least during the life of the relationships, and so on.

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[143] *Ibid.* at 391.

Many law reformers have pointed out the functional similarities between at least some marriage-like relationships and marriage.[144] And it is possible that marriage-like relationships would better fulfil marital functions and further legitimate state objectives if they were given more legal recognition and support. One of the explicit reasons behind Norway's adoption of a registered partnership scheme for same-sex couples was to encourage greater social stability and social cohesion.[145]

Marriage is a special kind of contract that creates a clearly defined status, and parties who marry are formally giving their consent to assume marital rights and obligations. Marriage-like relationships do not automatically operate as contracts or signal acceptance of marital rights and obligations or fulfil the function of creating a clearly defined status.

The fluidity surrounding marriage-like relationships because of the absence of any formal process of registration not only raises questions as to what the appropriate test for spousal status should be, but also makes it difficult to determine whether parties meet the relevant test for any particular purpose.[146] Because marriage-like relationships do not fulfil the function of conferring a clearly defined status, there is an absence of protection of persons who believe that they have an exclusive relationship with their partners, with all the economic

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[144] OLRC, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto, 1993) at 27-28 (on the functional similarities between opposite-sex cohabitation and marriage).

[145] Peter Lødrup, "Registered Partnership in Norway" in Andrew Bainham, *The International Survey of Family Law 1994* (The Hague: Martinus Nijhoff, 1996) 387. This article also discusses on the functional similarities between same-sex cohabitation and marriage.

[146] See, e.g., *Labbe* v. *McCullough* (1979), 23 O.R. (2d) 536 (Prov. Ct.).

entitlements that this entails. This problematic aspect of the unregistered nature of opposite-sex cohabitation was mentioned in *Taylor* v. *Rossu*, where the Alberta Court of Appeal discussed the Ontario Law Reform Commission's proposal on registered domestic partnerships and contrasted the proposed scheme with opposite-sex cohabitation: We note that under the Commission's proposals, an individual would lack the capacity to enter a registered domestic partnership if he or she were already married or in a registered and unrevoked domestic partnership with another. There are even greater controls on legal marriage. Not only does a married person lack the capacity to enter a new marriage, but the criminal law prohibits bigamy. There are no comparable rules in place governing common law unions and the informal, unregistered nature of common law unions would make such laws challenging both to draft and to administer.[147]

The extension of many of the rights and obligations traditionally associated with marriage to the unregistered relationship of opposite-sex cohabitation has brought back some of the problems that existed prior to the secularization of marriage, specifically the uncertainty in regard to marital status and risk of being surprised by the discovery that one's spouse owes marital obligations to another person.[148]

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[147] *Taylor* v. *Rossu* (1998), 39 R.F.L. (4th) 242 at para. 57 (Alta. C.A.), citing the OLRC, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto, 1993) at 53-56.

[148] *Nowell* v. *Town Estate*, leave to appeal granted March 19, 1998, [1997] S.C.C.A. No. 642 (Q.L.).

E. The Legal Rules Governing Marriage-like Relationships

Some of the legal rules governing marriage are set out in Appendix A, and the legal rules governing marriage-like relationships are set out in Appendices B, C, and D. The purpose of these appendices is to give an overview of the legal distinctions drawn between the various relationships. The legal rules governing opposite cohabitation and same-sex cohabitation are changing rapidly, so these appendices will become dated very quickly.

Many of the laws relating to marriage-like relationships are within the legislative jurisdiction of the provinces, pursuant to s.92(13) of the *Constitution Act*, which gives the provinces the power to make laws in relation to "property and civil rights" in the province. Pursuant to s.92(13), the provinces have legislative jurisdiction over "marital" property, spousal and child support, child custody and access, and most aspects of succession law. Many federal laws also affect those in marriage-like relationships by extending the definition of "spouse" to include unmarried couples for various purposes.

The power to enact laws relating to property and civil rights in the province would include the power to enact a registered partnership law in relation to matters falling within provincial jurisdiction. In order to enact a registered partnership law that gave partners a full range of marital rights and obligations, it would be necessary for the federal government to enact complimentary laws for matters falling within federal jurisdiction, e.g., immigration law.

The Ontario Law Reform Commission recommended a registered partnership scheme in 1993, and at that time considered the division of powers issue:

> We have considered the possibility that legislation enacting a Registered Domestic Partnership scheme could be challenged as a colourable attempt to trench on the federal marriage power. In our view, however, such a challenge would have a limited chance of success. The province has a general power to legislate in the field of property and civil rights and with respect to married and unmarried persons. It appears most unlikely that the creation of a new form of non-marital relationship for the purposes of regulating the parties' mutual rights and responsibilities as an intrusion on the federal marriage power. The introduction of a Registered Domestic Partnership scheme would have no impact on the legal capacity to marry, now would it affect the determination of spousal status for the purpose of federal law.[149]

As shown in the appendices, the federal government, the provinces, and courts have extended many of the rights and obligation traditionally associated with marriage to opposite-sex couples and, to a lesser extent, to same-sex couples. But there remain important distinctions between marriage and marriage-like relationships. Many of these distinctions, which are reflected in the legal rules and set out in the appendices, are undergoing or are vulnerable to a *Charter* challenge.

Legislators have been more willing to extend marital rights and obligations to opposite-sex couples that to other unmarried couples. Many government benefits and burdens and many mutual rights and obligations are extended to or imposed on opposite-sex couples who meet the statutory definition of "spouse." Generally a set period of cohabitation is required or the couple must have had a child together. The requisite cohabitation period varies across Canada.

For example, a member of an opposite-sex couple is entitled to claim spousal support

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[149] OLRC, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto, 1993) at 54-55.

after cohabitation for one year in Nova Scotia,[150] while in Manitoba five years of cohabitation is required.[151]

The requisite period of cohabitation also varies within provinces or territories, depending on the purpose of the legislation. In Ontario, e.g., for the purpose of spousal support, "spouse" includes either of a man or a woman not married who have cohabited for at least three years, or who have cohabited in a relationship of some permanence if the couple are the natural or adopted parents of a child.[152] But under Ontario law a person may qualify as a spouse for the purpose of giving consent to the use of a deceased partners's body or body parts for therapeutic purposes, medical education, or scientific research if the person cohabited with the deceased for only one year, and less than a year would be sufficient if the couple were the parents of a child or had entered into a cohabitation agreement.[153] The various definitions of "spouse" across Canada and for different purposes do not create a consistent or coherent legal framework for opposite-sex couples.

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[150] *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s.2(m).

[151] *Family Maintenance Act*, S.M. 1987, c. F-20, ss.1 and 4(3).

[152] *Family Law Act*, R.S.O. 1990, c. F.3, s. 29.

[153] *Human Tissue Gift Act*, R.S.O. c. H-20.

Not all marital rights and obligations have been extended to opposite-sex couples, and some of the laws that exclude opposite-sex couples from the definition of "spouse" are vulnerable to a *Charter* challenge in light the decision rendered by the Supreme Court of Canada in *Miron* v. *Trudel*.[154] In *Miron*, the Court ruled five to four that the exclusion of unmarried heterosexual partners from accident benefits available to married spouses under an automobile insurance policy, the terms of which were governed by Ontario's *Insurance Act*,[155] constituted discrimination on the grounds of marital status in violation of s.15 of the *Charter* and that the exclusionary provision was not a "reasonable limit" justified under s.1 of the *Charter*.[156]

Legislation such as Ontario's *Family Law Act*, which excludes cohabiting opposite-sex couples from the definition of "spouse" for the purpose of equalization of net family property, could be challenged as discriminatory on the basis of the *Miron* decision.[157] Most of the common law jurisdictions have extended spousal support rights to unmarried opposite-sex

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[154] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

[155] *Insurance Act*, R.S.O. 1980, c. 218, ss. 231, 233, Schedule C.

[156] Section 1 of the *Charter* provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[157] See, e.g., the definition of "spouse" for all purposes other than spousal support in Ontario's *Family Law Act*, R.S.O. 1990, c. F.3, s.1(1). This provision defines "spouse" as "either of a man and woman who, (a) are married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act.

couples, but even this limited recognition has been slow in some provinces.[158] No common law province includes unmarried couples in its scheme of marital property division, although the doctrine of unjust enrichment is applied in all of them to achieve a sometimes rough-and-ready property division between unmarried couples when their relationships break down.[159] Quebec, which has the highest rate of unmarried cohabitation in Canada (more than 20% of opposite-sex Quebec couples are unmarried[160]), has not yet extended spousal support rights to cohabiting couples.

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[158] In *Rossu* v. *Taylor*, [1998] A.J. No.648 (Q.L.), the Alberta Court of Appeal struck down the province's spousal support provisions because they failed to include one member of a cohabiting opposite-sex couple in the definition of "spouse," thereby discriminating on the basis of marital status contrary to the *Charter*, s.15. The Court of Appeal suspended the declaration of invalidity for one year to give the government time to draft new legislation. The Northwest Territories and Prince Edward Island are the other common law jurisdictions that have been slow to bring their legislation in line with the ruling in *Miron* v. *Trudel*, [1995] 2 S.C.R. 418, that marital status is a prohibited ground of discrimination under s.15 of the *Charter*. See *The Domestic Relations Act*, R.S.N.W.T. 1988, c.D-8 and the *Family Law Reform Act*, R.S.P.E.I. 1988, c.F-3.

[159] See, e.g., *Peter* v. *Beblow*, [1993] 1 S.C.R. 980.

[160] In 1996, 24% of cohabiting opposite-sex couples in Quebec were unmarried, while for Canada as a whole the percentage was 14: Statistics Canada, (1998), online: http://www.statcan.ca.

Unmarried parties are not entitled to marital property division on breakdown of the relationship under the Quebec Civil Code, although unmarried parties may obtain a share of their former partners' property under the Civil Code if they are able to prove a partnership, a contract or unjust enrichment.[161]

Future unmarried Quebec claimants will have the benefit of a law reform initiative announced on 18 June 1998 by the Justice Minister of Quebec Serge Menard. First, he indicated that the government would harmonize its public laws relating to unmarried couples to ensure that the criteria for recognition of unmarried couples would be uniform to the extent possible, and also that the public laws would also be amended to include same-sex couples. Thus the laws relating to such issues as pensions, automobile insurance, health insurance, and employment rights would be amended to harmonize the definition of spouse and to include same-sex couples within that definition. (A proposal to this effect was put before the National Assembly of Quebec on 21 October 1998 by M. Bouchard.[162])

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[161] *Beaudoin-Daigneault* v. *Richard*, [1984] 1 S.C.R. 2, confirmed the existence of the partnership as a possible remedy for unmarried cohabitants. In order to succeed it must be proven that the cohabitant contributed money or goods to a common fund and participated in the profits and losses of the partnership, and that there was an intention of parties to create partnership as basis of their economic activity.

A claim based on partnership, contract or unjust enrichment was put forward in *De L'Isle* v. *Carton*, [1997] Q.J. No. 1693 (Q.C.A.) (Q.L.), application for leave to appeal dismissed with costs December 4, 1997, [1997] S.C.C.A. No. 451 (Q.L.).

[162] Debates, National Assembly of Quebec, 21 October 1998.

As well, Menard announced that Quebec will also consider recognizing unmarried couples who want to legalize their union by giving certain marital rights and obligations to them, saying:

> La gouvernement prévoit également la possibilitié d'assurer, en droit privé, la reconnaissance juridique et social des unions de fait pour les conjoints de fait qui voudraient officialiser leur union et lui donner les effets civils particuliers. Des interventions législatives au Code civil pourraient régler les protections relatives au patrimoine familial, aux obligations alimentaires ou encore aux héritiers pour les conjoints de fait. Les interventions législative seront précédes de consultations publiques.[163]

The work to amend the Civil Code to extend private marital rights and obligations to unmarried couples is proceeding more slowly than the amendments of the public laws, and will require a process of public consultation and consideration by a parliamentary ommittee.[164]

Quebec's tentative plan to include not only opposite-sex but same-sex couples within its revised scheme of marital rights and obligations will make Quebec the second province to move forward with a broad scheme of legislative reform to expand the rights and obligations of same-sex couples. British Columbia already has legislation that extends a wide range of marital rights and obligations to same-sex couples.[165]

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[163] Gouvernement du Québec, Communiqué, 18 June 1998.

[164] *Ibid.*, and email communication from Claudine Ouellet, Directrice générale de la Coalition gaie et lesbienne du Québec, 9 March 1999.

[165] The following statutes extend marital rights and obligations to same-sex couples in British Columbia: *Adoption Act*, R.S.B.C. 1996, c.5, s.29; *Criminal Injury Compensation Act*, R.S.B.C. 1996, c.85, s.1; *Medicare Protection Act*, R.S.C.B. 1996, c.286, s.1; *Victims of Crime Act*, R.S.B.C. 1996, c.478; *Family Relations Amendment Act, 1997*, S.B.C. 1997, c.20; *Family Maintenance Enforcement Amendment Act*, 1997, S.B.C. 1997, c.20.

Over the past decade, courts and human rights tribunals in a number of provinces have used human rights legislation that prohibits discrimination on the basis of sexual orientation to ensure that lesbian women can have full access to artificial insemination,[166] and to give same sex partners "spousal status" for a range of employment related benefits. Some employers have voluntarily extended spousal benefits to the same-sex partners of their employees,[167] while others who attempted to exclude same-sex partners from spousal benefits were successfully challenged in grievances under the anti-discrimination clauses of collective agreements.[168]

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[166] *Korn* v. *Potter*, [1996] B.C.J. 692 (B.C.S.C.).

[167] Dennis Slocum, "TD Gives Gay Couples Benefits" *Globe and Mail* (30 December 1994). Some employers, however, resisted voluntary extension of benefits to same-sex partners, despite vigorous requests from employees, on the grounds that current Canadian legislation did not require it: Dennis Slocum, "Imperial Oil Rejects Same-sex Benefits" *Globe and Mail* (20 April 1995).

[168] *Canadian Telephone Employees' Association* v. *Bell Canada* (1994), 43 L.A.C. (4th) 172.

The most important current *Charter* challenge in relation to the definition of "spouse" is that in *M.* v. *H.*[169]

In *M.* v. *H.*, one member of a lesbian couple applied for spousal support after the relationship broke down, pursuant to Ontario's *Family Law Act*.[170] The definition of "spouse" in the legislation was challenged on the basis that it is limited to heterosexual couples and therefore violates the *Charter* guarantee of equality.[171] The applicant was successful at the Ontario Court (General Division) and the Ontario Court of Appeal. The Supreme Court of Canada heard the appeal in early 1998 and reserved its decision. If the Ontario Court of Appeal's decision is upheld by the Supreme Court, this would mean that any legislation that expands the definition of "spouse" to include one member of an unmarried opposite-sex couple would have to be amended to include one member of a same-sex couple, at least if it deals with "private" rights and obligations between the parties, as opposed to government benefits, which were at issue in the *Egan* case. Legislation that was not amended would be subject to *Charter* challenge. Although s.33 of the *Charter* permits legislatures to enact a law that will operate notwithstanding the rights guaranteed in the *Charter*, it is unlikely that they would do so.

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[169] *M.* v. *H.* (1996), 31 O.R. (3d) 417 (C.A.), leave to appeal to Supreme Court of Canada granted [1997] S.C.C.App. No. 101 (Q.L.).

[170] *Family Law Act*, R.S.O. 1990, c. F.3.

[171] The *Family Law Act*, *ibid*, section 29, extends the definition of "spouse" for the purposes of spousal support to include "either of a man and woman who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child."

Premier Ralph Klein decided not to invoke s.33 to override the decision in *Vriend* v. *Alberta*, in which the Supreme Court of Canada effectively rewrote Alberta's human rights legislation to include sexual orientation as a prohibited ground of discrimination,[172] despite substantial pressure on the Premier to do so.[173]

Proposed changes to Canada's immigration laws would enable Canadians to sponsor same-sex partners for immigration. Early in 1998, Canada Minister of Citizenship and Immigration released a report which states:[174]

> Our approach highlights the importance of the family in Canadian society, both in its traditional and non-traditional forms. We recommend a definition of "spouse" that would recognize same-sex and common-law relationships for the purposes of the Immigration and Citizenship Act .... The development of more flexible definitions reflects the diversity of family arrangements and connections in this country.

During the first week of 1999, the federal government announced that it would proceed with the proceed changes to the immigration law, and that "In order to adjust to social realities and to ensure fair treatment under the legislation, the new directions aim to expand the definition of spouse to include common-law and same-sex couples."[175] Plans to amend all federal statutes

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[172] *Vriend* v. *Alberta*, [1998] S.C.J. No.29 (Q.L.).

[173] Brian Laghi, "Rage Finds its Voice in Alberta" *Globe and Mail* (11 April 1998).

[174] Canada, Department of Citizenship and Immigration, Legislative Review Advisory Group, *Not Just Numbers: A Canadian Framework for Future Immigration* [Executive Summary] available from Jean Edmonds Tower North, 6th Floor, 300 Slater Street, Ottawa, Ontario, K1A 1L1 email: legrev@istar.ca.

[175] Citizenship and Immigration Canada News Release, "Strengthening Family Reunification" (6 January 1999).

to eliminate definitions of "spouse" that discriminate against same-sex couples were announced later the same month.

If the Supreme Court of Canada upholds the Ontario Court of Appeal's ruling in *M.* v. *H.* that exclusion of a member of a same-sex couple from the definition of "spouse" for the purposes of spousal support is unconstitutional, other provinces and territories will effectively be forced to introduce at least some of the legislative amendments that British Columbia has already made and that Quebec seems to be intending. However, a province could delay amending its legislation until forced to do so by a court challenge, and could then avoid the obligation to amend its legislation by invoking the notwithstanding clause of the Constitution.

In 1993, the Ontario Law Reform Commission issued its *Report on the Rights and Responsibilities of Cohabitants.* It recommended that heterosexual cohabitants should have the same rights and responsibilities as married spouses throughout the province's *Family Law Act.* The Commission also proposed adopting a registered partnership that would provide a mechanism for allowing opposite-sex, same-sex, or non-conjugal couples to opt into the *Family Law Act.* Registered partnership laws have been introduced in several countries. They allow couples who register to obtain many marital rights and obligations. Under the Commission's proposed scheme, partners would have to be at least 18 years of age and not be already married or in a registered partnership with another person. Failure to comply with such requirements would render the partnership void.

Registration could be revoked unilaterally upon giving notice to the other partner.[176]

Although Ontario's New Democratic government did not follow the recommendation regarding registered partnership, in 1994 it introduced legislation that would have extended to same-sex couples the same rights enjoyed by heterosexual common law couples, including the right to claim spousal support from a same-sex partner, the right to spousal benefits, and the right to adopt children.[177] Ontario had already enacted legislation giving a same-sex partner the right to consent to medical treatment in cases where the other partner lacked capacity to give consent,[178] but Bill-167, the 1994 legislative proposal, went much further. The government allowed its members to have a free vote on the legislation. When it became clear that Bill-167 was not going to pass, the government offered to amend the Bill to make it more palatable to a majority, in particular by removing the provision that would have allowed same-sex couples to adopt children.[179]

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[176] OLRC, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto, 1993) at 53-56.

[177] Bill 167, *An Act to Amend Ontario Statutes to Provide for the Equal Treatment of Persons in Spousal Relationships*, 3rd Sess., 35th Leg. Ont., 1994.

[178] *Consent to Treatment Act*, 1992, S.O 1992, C.31, proclaimed in force April 3, 1995.

[179] "Boyd Backs Off on Gay Spouses," *The Globe and Mail* (9 June 1994).

Despite removal of the adoption clause that many had objected to, Bill 167 was narrowly defeated in a free vote, on 9 June 9 1994.

Supporters were frustrated by the defeat, and some activists responded by planning to launch a vigorous programme of court challenges to the provincial and federal statutes that arguably discriminate against same-sex couples, thereby continuing the pressure to enact legislative reforms.[180] When the Conservative party came to power in Ontario, the government's policy with regard to same-sex couples changed drastically. The Ontario government is fighting against the extension of rights and benefits to same-sex couples and is the real appellant in the *M.* v. *H.* appeal to the Supreme Court of Canada. Ironically, same-sex couples in Ontario now have the right to "step-parent" adoptions pursuant to the 1995 decision in *Re K.*, in which Judge Nevins ruled that Ontario's adoption legislation violated the *Charter* by discriminating on the basis of sexual orientation. By way of remedy Judge Nevins "read in" the following definition of spouse: '"spouse" means the person to whom a person of the opposite is marriage or with whom a person of the same or opposite sex is living in a conjugal relationship outside of marriage."[181]

Ontario is typical of Canadian jurisdictions in ceding much of the responsibility for crafting family policy, particularly in relation to same-sex couples, to the courts.

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[180] John Beaufoy, "Lawyers Plan to Challenge Laws After Defeat of Bill 167" *The Law Times* (20-26 June 1994).

[181] *Re K.* (1995), 15 R.F.L. (4th) 129 (Ont. Prov. Div.).

James McLeod, in his annotation to *Taylor* v. *Rossu*, an Alberta Court of Appeal ruling that the provinces spousal support law discriminated on the basis of marital status by excluding unmarried opposite-sex couples, wrote:

> The reality is that many politicians are content to let judges make hard social decisions. The legislators and judges appear to have reached an uneasy compromise whereby judges will decide what relationship should be characterized as "quasi-spousal" and the legislators will accept the decision.[182]

Although not a "spousal rights" case, *Vriend* v. *Alberta* provides a clear example of the phenomenon identified by McLeod.[183] When the Supreme Court of Canada ruled in *Vriend* that Alberta's human rights legislation violated section 15 of the *Charter* because it did not protect homosexuals from discrimination and that the Act be interpreted as if it contained the words "sexual orientation," many Albertans were outraged, but the Premier of Alberta rejected calls to override the decision by invoking section 33 of the *Charter*, which permits legislatures to enact a law that will operate notwithstanding the rights guaranteed in the *Charter*.[184]

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[182] James McLeod, "Annotation," *Taylor* v. *Rossu* (1998), 39 R.F.L. (4th) 242 at 246 (Alta. C.A.). David Corbett, lawyer for the Foundation for Equal Families, quoted in "Group Hopes Lawsuit Spurs Legislative Action on Gay Rights" *The Globe and Mail* (8 January 1999), made the same point: "It's simpler for [politicians], from a political point of view, to have the courts force them to do this rather than to comply with the principles that have been established." Philp J.A. discussed tendency of legislators to "duck" difficult social policy questions, including the rights and obligations of same-sex couples, in *Vogel* v. *Manitoba*, [1995] M.J. No. 235 (C.A.)(Q.L.).

[183] *Vriend* v. *Alberta*, [1998] S.C.J. No.29 (Q.L.).

[184] Brian Laghi, "Rage Finds its Voice in Alberta" *The Globe and Mail* (11 April 1998).

One of the problems with the tendency of Canadian legislators to leave social policy questions to be decided by courts was identified by Supreme Court of Canada Chief Justice Lamer, who commented that judges, unlike legislators, cannot "duck" difficult issues, such as same sex benefits, and that:

> A judge cannot approach a case as a legislature would. The scope of the judge's decision is defined by the questions submitted by the parties. The answer which the judge gives is constrained and dictated by the legal context in which the dispute arises.[185]

The difficulties experienced by judges who are effectively forced to craft social policy in the context of a law suit are reflected in the opinion of Sopinka J. in *Egan* v. *Canada*.[186] Justice Sopinka found that the definition of "spouse" for the purpose of a federal old-age pension scheme discriminated on the basis of sexual orientation, but in the final result he joined with the four justices who determined that there was no discrimination. Justice Sopinka ruled that the discriminatory provision was "saved" by s.1 of the *Charter*, because it was a reasonable limit prescribed by law that could be "demonstrably justified in a free and democratic society," and the majority decision went against the same-sex couple. Justice Sopinka reasoned that the government need not be "proactive in recognizing new social relationships," and that with limited funds available, benefits cannot be granted to all. Justice Sopinka seemed reluctant to follow the outcome dictated by the law, as he interpreted it, because of the implications for our polycentric system of family regulation and government fiscal policy.

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[185] Chief Justice Antonio Lamer, Address to the Empire Club in Toronto, 13 April 1995, quoted by Philp J.A. in *Vogel* v. *Manitoba*, [1995] M.J. No. 235 (C.A.)(Q.L.) at para.1.

[186] *Egan* v. *Canada*, [1995] 2 S.C.R. 513.

Although Sopinka J. found a way to give responsibility for family policy back to legislators, many courts have found themselves unable to "duck" the hard questions.

Another problem with leaving family policy questions to the courts is inefficiency. Wendy Adams points out that, "Litigation is an expensive, time-consuming, and cumbersome process, and establishing a categorical legal status for same-sex relationships would be more effective."[187] As well, refusal on the part of legislators to act can generate anger and alienation. At the beginning of January 1999, the Foundation for Equal Families brought an "omnibus" lawsuit challenging dozens of federal statutes that discriminate against same-sex couples. The motivation for this unusual lawsuit is, reportedly, to make the federal government finally change its laws to reflect court rulings: "Gays and lesbians are fed up with bringing legal challenge after legal challenge – which they have done consistently over the past decade – to fight discriminatory laws."[188]

On the same day that the omnibus lawsuit was launched, Immigration Minister Lucienne Robillard announced proposed changes to the immigration and refugee system that would include expanding the definition of "spouse" to include cohabiting couples of the same or opposite sex. At the same time, the Minister announced that "a national federal strategy is being formulated to deal with a number of court decisions, including one that allows same-sex

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[187] Wendy A. Adams, "Same-sex Relationships and Anglo-Canadian Choice of Law: An Argument for Universal Validity" (1996) 34 The Canadian Yearbook of International Law 103 at 106-07.

[188] "Group Hopes Lawsuit Spurs Legislative Action on Gay Rights" *The Globe and Mail* (8 January 1999).

partners to receive survivor benefits from pension plans."[189] These announcements from the federal government, the legal reforms already enacted in British Columbia, and those announced for Quebec indicate that at least some Canadian legislators are now willing to resume responsibility for making social policy and legislation in relation to families.

There have been hundreds of Canadian cases over the past several years dealing with issues of the rights and obligations of unmarried opposite-sex and same-sex couples, and these cases have contributed to the declining legal significance of marriage. The result of the hundreds of court decisions and some statutory reform is a patchwork of laws that do not represent a consistent or coherent approach to regulation of marriage or cohabitation. "Spouse" is defined in various manners for different purposes, resulting in arbitrary rules that do not always protect posited social goals. The periods of cohabitation and other requirements for meeting the definition of "spouse" vary, and the various requisite elements of spousal status are not clearly linked with accepted social goals or legitimate state objectives. The various definitions of "spouse" should be reassessed to ensure consistency and rationality.

As Serge Menard commented: "Les critères de reconnaissance de l'union de fait, notamment quant law durée de la vie commune, devront, dans la mesure du possible, être uniformes."[190]

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[189] "Robillard is Seeking Same-sex Rights for Immigrants" *The Globe and Mail* (8 January 1999).

[190] Gouvernement du Québec, Communiqué, 18 June 1998.

VI. ALTERNATIVE APPROACHES[191]

> Unique et pluraliste, le mariage civil est une institution vivante, peut-être l'une des plus vivantes de nos instituions, qui a pu au cours du temps, parce qu'il était unique, et à travers des debats orageux se transformer profondément et intégrer les principes démocratiques d'égalité et de liberté.[192]

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[191] My comments on Europe and the USA are informed by discussions with scholars, lawyers and advocates from those places. I am particularly grateful to Dr. Caroline Forder, University of Maastricht, who generously shared drafts of background papers she prepared for the Fifth European Conference on Family Law, the Hague, 15-16 March 1999. Dr. Kees Waadijk, University of Leiden, provided helpful information on the legalization of same-sex marriage in the Netherlands. Participants in the Conference on Interjurisdictional Marriage Recognition, 18-20 June 1998, Creighton University School of Law, Omaha, Nebraska, gave me first-hand exposure to the arguments of the American "religious right" against legal recognition of same-sex unions. The Vermont Freedom to Marry Task Force, which advocates for same-sex marriage, provided helpful discussion and material. Lawyers on both sides of the same-sex marriage legal challenges in Hawaii and Vermont were generous with their time and materials.

[192] (Irène Théry) *Droit de la famille: Ne pas se tromper de réforme*, Une journée d'auditions publiques de la commission des Lois de Sénat, Les rapports du Sénat, no.481 (Paris: 1997-98) 15.

In this part of the paper, I review selected legal developments in relation to marriage and marriage-like relationships in some European countries and American states, with particular focus on jurisdictions that have recently introduced or are actively considering reforms.

Europe and the USA have experienced changes in family life similar to those in Canada. These changes include an increase in opposite-sex cohabitation, a rise in the number of children born outside of marriage, increased participation by married women and mothers of young children in the waged labour force, higher rates of divorce, and growing recognition and tolerance of homosexuality and same-sex couples. The western legal culture pattern of legal reform that has taken place during these social changes has included: a) the introduction of no-fault divorce; b) legal equality of husband and wife in relation to marital and parental rights and obligations; c) decriminalization of homosexuality; d) prohibition of discrimination on the basis of sex or sexual orientation; e) recognition of heterosexual cohabiting couples for "negative" reasons, e.g., a live-in partner might disqualify a party from government benefits; f) a reduction in "family" benefits and increase in "individual" benefits; g) recognition of heterosexual cohabiting couples for "positive" reasons, e.g., for some government or employee benefits; h) extension of some government or employee benefits and some marital or "parental" rights and obligations to same-sex couples; i) introduction of registered partnerships for same-sex couples or for both same-sex and opposite-sex couples; j) move towards same-sex marriage.

There are many variations on this general pattern of legal reform. The timing and depth of reforms varies across states, and some states seem unlikely even to decriminalize sodomy in the near future,[193] much less extend benefits, rights, and obligations to same-sex couples. In many states, there has been some involvement of the courts, e.g., to make rulings on whether particular laws are discriminatory. In Europe many governments have accepted such court rulings as cues and have taken on the responsibility for law reform. This is in contrast with North America, where, at least in relation to same-sex couples, governments have tended to react to court rulings rather than take a leadership role in law reform. In at least some European countries, current law and policy relating to same-sex couples is much more the product of government-led public consultation and legislative reform than of court challenges or referenda. Court challenges and bitter political debates over the regulation of same-sex couples have taken place in Europe, but the governments have more of a leadership role than in North America, particularly in countries that have adopted or that are currently considering the adoption of registered partnership laws.

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[193] The US Supreme Court upheld the constitutionality of laws criminalizing sodomy in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). William N. Eskridge, Jr., in "Democracy, Kulturkampf, and the Apartheid of the Closet" (1997) 50 Vanderbilt Law Review 419 at 426, decribes *Bowers* v. *Hardwick* as "the most uniformly criticized Supreme Court decision in my lifetime."

A. Europe

In most European states, cohabitation alone does not lead to a legally recognized status.[194] However, cohabitation is recognized for some purposes, and many European states will enforce cohabitation contracts that structure the mutual rights and obligations of the parties.[195] In the absence of an enforceable cohabitation agreement, the general laws of property, succession or partnership will apply to cohabiting couples, if relevant, but family laws generally do not apply. The reluctance to extend significant marital benefits, rights and obligations on the basis of cohabitation alone can be explained in part by continuing support for marriage and by respect for the autonomy of parties.[196]

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[194] Barbara E. Graham-Siegenthaler, "Principles of Marriage Recognition Applied to Same-sex Marriage Recognition in Switzerland and Europe" (1998) 32 Creighton L. Rev. 121 at 126.

[195] See generally Carolyn Hamilton & Kate Standley, eds., *Family Law in Europe* (London: Butterworths, 1995). In Portugal, however, cohabitation agreements are not valid: Alexandre de Sousa Machado, "Family Law in Portugal" in Hamilton & Standley, *ibid.*, 377 at 396.

[196] See, e.g., Eugen Dietrich Graue, "Family Law in Germany" in Hamilton & Standley, *ibid.*, 165 at 193: "German law accepts the proposition that people living together are free not to marry and thereby to avoid the responsibilities and restrictions imposed upon married persons. However, such persons cannot, as a matter of principle, demand the protection and privileges connected with marriage."

However, it may also be related to the greater emphasis put on clarity of status through registration in the civil law jurisdictions of Europe.

The European Court has ruled that article 12 of the European Convention on Human Rights, which guarantees the right to marriage, is directed at unions formed by two people of the opposite sex.[197] Thus, European countries are not bound to allow same-sex marriage, none has done so yet, and only the Netherlands has announced a commitment to legalize same-sex marriage. Several European countries have registered partnership laws or laws extending rights and obligations to cohabiting couples, and currently many are considering reforms to introduce such laws.

Membership in the European Union brings with it enhanced freedom of movement within the EU, and this requires each member country to give particular attention to the private international law issues arising from the enactment of registered partnership laws in some EU states. In early 1999, the European Court of Justice, Court of First Instance, ruled that EU law does not require the Council of the European Union to treat the Swedish registered partnership of a Council employee as equivalent to marriage for the purpose of employment benefits.[198]

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[197] *Rees* v. *United Kingdom*, [1987] 2 F.L.R. 111; *Cossey* v. *United Kingdom*, [1991] 2 F.L.R. 492.

[198] *D. et Royaume de Suède* c. *Conseil de L'Union européenne*, T-264/97 (C.F.I.E.C., 28 January 1999).

This decision and the private international law aspects of registered partnerships and cohabitation in general were discussed at the Fifth European Conference on Family Law, in the Hague on 15-16 March 1999. There was general agreement that the private international law aspects of registered partnerships and cohabitation require attention. The Secretary General and First Secretary of the Hague Conference on Private International Law participated in the conference, and suggested that the Hague Conference could support a working group to address the private international law aspects of registered partnerships and cohabitation. It is recommended that Canada support an expert to participate in any such working group.

The European countries discussed below are Denmark, Norway, the Netherlands, France, Spain, and Switzerland. With the exception of Switzerland, all of these countries have adopted or are actively considering the adoption of reforms to give enhanced legal recognition to couples in marriage-like relationships. It should be noted that other European countries have made or are considering similar reforms. Hungary, e.g., has enacted a law to regulate the ownership of property acquired by cohabiting couples or by relatives living together, and the law was extended to include same-sex cohabiting couples in 1996.[199] Sweden and Iceland have registered partnership laws similar to those in the other Nordic countries, which allow same-sex couples to register obtain most marital rights and obligations.[200]

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[199] Hungarian Civil Code, sections 578/G and 685/A.

[200] Sweden's *Registered Partnership (Family Law) Act* came into force on 7 June 1994 and is outlined in D. Bradley, "Radical Principles and the Legal Institution of Marriage: Domestic Relationship Law and Social Democracy in Sweden" (1990) 4 International Journal of Law and the Family 154; Iceland, *Confirmed Cohabitation Act*, Law and Ministerial Gazette A No.

Belgium enacted a *Statutory Cohabitation Act* in October 1998, not yet in force, which will allow opposite-sex or same-sex couples to obtain certain marital rights and obligations, and a legislative proposal to enact a registered partnership law was put before Belgium's Parliament in February 1998.[201] There are many recent and pending legal reforms in Europe, and the discussion below includes just a selected sample of legislative initiatives.

Denmark

Like most European countries, Denmark has no cohabitation legislation, although cohabitation is recognized for the purpose of social benefits and taxation in the event of death.[202] Thus, cohabitation may render a single woman ineligible for various social security benefits. On the other hand, an economically dependent person whose cohabiting partner dies may be entitled for compensation for loss of the supporting partner.[203] And although cohabitants have no marital property rights, courts have ruled that one partner should not leave the other in an unreasonable financial situation and have made awards based on the principle of unjust enrichment or the principle of protecting a well-founded expectation of not

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[201] Caroline Forder, "National Report on Belgium" for presentation at the Fifth European Conference on Family Law, The Hague, 15–16 March 1999.

[202] L. Nielsen, "Individual and Family Economic Security and the Role of the State" in M. T. Meulders-Klein & John Eekelaar, eds., *Family, State and Individual Economic Security*, Vol 1 (Brussels: Story-Scientia, 1988) 457.

[203] Act. No. 228, 23 May 1984.

being left without financial support.[204] The reasoning and approach in the cases on this issue are similar to that applied in the unjust enrichment cases involving cohabitants in Canada.[205]

In 1983, a committee set up by the Ministry of Social Affairs to review the issue of equal treatment between cohabitation and marriage expressed the basic principle that there should be no special advantages to living together rather than being married.[206] In 1986, the committee reported that there was no clear solution to the question of whether cohabitation should be treated equally to marriage. The committee identified two principles that could be applied to this question: the "family (or household) principle" and the "individual principle." The family principle requires that social security benefits and other rights and obligations be granted and calculated on the basis of a person's relationship to another person or to a household. The individual principle means that each person's eligibility for benefits or burdens is assessed solely on the basis of that person's financial circumstances without regard to the person's household or marital relationship.

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[204] I. Lund-Anderson, "Moving Towards an Individual Principle in Danish Law" (1990) 4 International Journal of Law and the Family 328.

[205] *Peter* v. *Beblow*, [1993] 1 S.C.R. 980.

[206] My discussion of these principles is based on I. Lund-Anderson, "Moving Towards an Individual Principle in Danish Law" (1990) 4 International Journal of Law and the Family 328; Linda Nielsen, "The Family Principle and the Individual Principle – And Recent Legislative News" in Andrew Bainham, ed., *The International Survey of Family Law 1995* (The Hague: Martinus Nijhoff, 1997) 127; and Linda Nielsen and Annette Kronborg, "Legislation on Assisted Reproduction, Reports on Adoption, the Family Principle and the Individual Principle and Blessing Registered Partnerships" in Andrew Bainham, ed., *The International Survey of Family Law 1996* (The Hague: Martinus Nijhoff, 1998) 135.

The committee noted that the individual principle would lead to an increase in public expense, e.g., because the income of a partner would not be taken into account in determining entitlement to social security benefits, but that it was in harmony with the actual trends of society. In 1987, the Danish Parliament passed a resolution urging the government to introduce the individual principle in the area of family and social policy.

The adoption of the individual principle has not led to whole-scale reform but it has affected Danish law to some extent. For example, the income of a cohabitant is not taken into account in determining entitlement to social aid, because the cohabitant has no obligation to provide support. But still a party who has in fact been supported by an unmarried partner may not be in a position of need and may therefore be denied social aid.

The individual principle is based on the values of independence and autonomy and is part of the rationale for not extending marital rights and obligations to unmarried cohabitants. In 1995, Linda Nielsen commented that "the individual principle is gaining ground, due to a political decision and legislative initiatives," and that the family principle "is diminished by the great number of cohabitants, which means that approximately one-fifth of all person living together with or without marriage are excluded from the traditional family legislation."[207]

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[207] Linda Nielsen, "The Family Principle and the Individual Principle – And Recent Legislative News" in Andrew Bainham, ed., *The International Survey of Family Law 1995* (The Hague: Martinus Nijhoff, 1997) 127 at 139.

In 1999, however, the move towards the individual principle seemed to be stalled, and Denmark is now reconsidering its family laws and extend legal recognition to cohabitants in the future.[208]

Denmark's move towards the individual principle and ongoing reevaluation of the extent to which marriage and other family relationships should be privileged or the subject of special burdens has been cautious. The individual principle marks a shift of family law away from its protective role and towards a role of regulating established rights. And commentators have pointed out that in regard to such areas as spousal support a precipitous abolition of the duty of support on the basis of the individual principle would disadvantage women, who are the primary beneficiaries of protective family laws.[209]

The discussions in Denmark of the application of the individual principle to modify protective family laws are reminiscent of the debates in Canada in regard to spousal support. Some have questioned the rationale behind a continuing obligation of spousal support, pointing out that the economic need of an ex-wife is a social problem and the responsibility of the government rather than the former husband.[210] But with the continuing economic inequality of women, the implication of marriage and marriage-like relationships in that inequality, and the lack of adequate alternative sources of support, a strict application of the

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[208] Comments of I. Lund-Anderson to author, 15 March 1999, The Hague.

[209] I. Lund-Anderson, "Moving Towards an Individual Principle in Danish Law" (1990) 4 International Journal of Law and the Family 328.

[210] See, e.g., *Messier* v. *Delage* (1983), 35 R.F.L. (2d) 337 (S.C.C.) (Lamer J., dissenting).

individual principle at this time would be problematic.[211]

Denmark was the first country in the world to enact a registered partnership for same-sex couples. Its law came into effect on 1 October 1989.[212] The purpose of the legislation was to equalize the social status of same-sex and opposite-sex couples, and other assumptions and objectives underlying the law were set out in the registered partnership Bill as follows.[213] First, the Bill was aimed at creating a legal institution for same-sex partners that would improve their opportunities for regulating their lives in accordance with their own wishes and choices. As well, the Bill assumed that formal recognition of same-sex relationships would improve the chances of long-lasting and stable relationships between same-sex couples. The Bill assumed that a legal institution such as registered partnership was necessary to give same-sex couples the same rights as married persons. The Bill was intended to support the values of autonomy and equality by allowing same-sex couples the same right to choose between formalization or non-formalization of their relationships. The Bill noted one final objective, identified as of minor significance, and this was the creation of a more positive attitude towards long-lasting same-sex partnerships which perhaps would reduce the number of short-term relationships and thus reduce the risk of AIDS.

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[211] See generally the discussion of L'Heureux-Dubé J. in *Moge* v. *Moge*, [1992] 3 S.C.R. 813.

[212] *Registered Partnership Act*, Act No. 373, 1 June 1989. For a translation, see Jorge Martin, "English Polygamy Law and the Danish Registered Partnership Act: A Case for the Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England" (1994) 27 Cornell International Law Journal 419, footnote 79.

[213] See Linda Nielsen, "Family Rights and 'Registered Partnership' in Denmark" (1990) 4 International Journal of Law and the Family 297 at 298.

As of 31 December 1997, Denmark's statistics indicate that 7,082 persons had entered into registered partnerships, and 540 partnerships had been dissolved.[214] Between 1989 to 1993 many more gay men than lesbians decided to get registered, and in total, 4550 gay men and 2,532 lesbians have registered. After 1993, the registration rates of gay men dropped to the same level as that of lesbians, i.e., under 200 partnerships yearly, and in 1997, gay men entered into only 81 partnerships compared with 159 partnerships for lesbians. Lesbian registration has been relatively stable at about 100 to 200 partnerships per year, although in 1993 lesbians registered only 78 partnerships. Between1990 and1996, the mortality among gay men in registered partnerships was 20-30 persons yearly, but in 1997 there were only 5 deaths among gays in registered partnerships.

Denmark also keeps some statistics on children living with parents in registered partnerships, although these statistics are not completely accurate. At the end of December 1997, there were 106 registered partnerships with a total of 128 children under 18 living at home (71 registered partnerships have one child, 28 have two children, and seven families have three children). Assuming that most of the partnerships with children are lesbian relationships, about 8% of all lesbian partnerships have children under the age of 18 living at home. Currently, registration of a partnership has no legal consequences for children, and registered partners cannot obtain legal joint custody.

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[214] Denmark Statistics calculate the number of registered partners based on information regarding marital status they receive from the Civil Registration System, and only Danish citizens have been counted. Denmark Statistics suggest that the actual number of persons who are registered might be 10 to 25% higher.

Registered partners cannot adopt a child, and stepparent adoption by the registered partner of a parent is not permitted. Denmark is currently reviewing its family laws, in particular its laws relating to the children of registered partners.[215]

Norway

For the most part, cohabiting couples are treated as single people in Norway, and the law does not impose any mutual rights or obligations.[216] However, Norway enacted the *Joint Household Act* in 1992 to provide some protection to any group of people living together in the same household for at least two years.[217] Under the Act, two people who have a child together are protected even through they have not lived together for two years. The *Joint Household Act* provides that if the joint household is terminated by death or breakdown of the relationship, one of the cohabitees may be given the right to occupy the joint home or to use the household goods.

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[215] Presentation by Svend Danielsen, Judge of the Eastern High Court of Denmark, Fifth European Conference on Family Law, The Hague, 15–16 March 1999.

[216] Peter Lødrup, "Family Law in Norway" in Carolyn Hamilton & Kate Standley, *Family Law in Europe* (London: Butterworths 1995) 353 at 374-75.

[217] *Joint Household Act*, Act No. 45, 4 July 1992.

In 1993, Norway enacted a registered partnership law that was modeled on the Danish law.[218] Under the law, registration results in almost all the legal consequences of marriage. The only major exception is that registered couples do not have the right to adopt children. The reasons for the law were laid out by Norway's Ministry of Children and Family Affairs in the Bill presented to Norway's Parliament. Peter Lødrup summarized the Ministry's reasons in an article published shortly after enactment of the new law, and the following discussion is largely based on his article.[219]

The first reason for the registered partnership law was the similarity between same-sex couples and married couples and the resulting economic conditions that created a need for a regulatory scheme similar to marriage:

> The economic conditions under which homosexual couples live are of the same nature as those for married couples, apart from those concerning responsibility for children. Gay and lesbian couples have the same emotional and practical reasons for desiring reciprocal rights and obligations, and there is the same need to protect the weaker party.[220]

The admitted right of same-sex couples to enter into private contracts governing such issues as inheritance and household property was not an adequate legal framework for governing such relationships because, "like cohabiting heterosexual couples, very few homosexual partners make use of the opportunity to enter into such agreements,

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[218] *Act on Registered Partnership for Homosexual Couples*, Act No. 40, 30 April 1993, in force 1 August 1993. For a translation, see Peter Lødrup, "Registered Partnership in Norway" in Andrew Bainham, *The International Survey of Family Law 1994* (The Hague: Martinus Nijhoff, 1996) 387.

[219] Lødrup, *ibid.*

[220] *Ibid.* at 388.

partly because they do not foresee the need for them in case of crisis, such as the death of one of the couple or dissolution of the relationship in other ways."[221]

Moral values and social objectives were also important reasons for Norway's registered partnership law. Norway decriminalized homosexual relations between men in 1972 and prohibited discrimination against homosexuals in 1981. Today, a "more tolerant attitude has developed along with increased knowledge of the nature of homosexuality and the social situation of gays and lesbians."[222] With the enactment of the registered partnership law, Norway intended to promote stability and reciprocal obligations in same-sex relationships, in part by reducing the stigmatization of such relationships thereby making it more likely that a strong social support network that would be available to support partners who were experiencing problems. Registration was seen as a mechanism for a couple to signal to family and friends their wish to enter a committed relationship. And it was thought that the commitment connected to registration might increase the efforts of same-sex couples to work out any problems arising in their relationships.

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[221] *Ibid.* at 389.

[222] *Ibid.*

Norway's law was also intended to reduce the isolation of gay and lesbian persons and to increase social cohesion:

> A registered partnership will imply openness, and a departure from the traditional invisibility of gay and lesbian relationship will provide many homosexuals with positive role models. Stable relationships provide security and a sense of belonging. Most homosexuals live alone and are liable to be lonely and socially isolated. But most of them wish to live as couples. Homosexuals have the same need for security and growth within a lifelong relationship as do heterosexuals, and should therefore be given the same support in establishing permanent, committed relationships.[223]

The law was intended to signal public acceptance of same-sex partnerships, and to encourage more gay and lesbian persons to come out, thereby reducing the problems created by living in the closet and in isolation.

Norway's Ministry firmly rejected the argument that acceptance and legal recognition of same-sex couples would weaken marriage or have a negative impact on family stability:

> That gays and lesbians wish to give greater commitment to their relationships is a confirmation of the ideals of marriage – a desire for a permanent relationship based on mutual caring. A homosexual relationship can however never be the same as marriage, neither socially nor from a religious point of view. It does not replace or compete with heterosexual marriage. The only other option available to a homosexual couples is for their relationship to remain unregulated. The opportunity for homosexuals to register their partnerships will not lead to more people opting for homosexual relationships rather than marriage.[224]

The Bill on registered partnerships was commented on by various organizations prior to its presentation in Norway's Parliament. The majority of those commenting on the Bill were in favour of it or neutral.

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[223] *Ibid.* at 390.

[224] *Ibid.* at 391-92.

The majority of bishops and clerical organizations, however, expressed the view that the Bill went too far in giving same-sex partners the same rights as married couples, and that it would therefore weaken the position of marriage. The Bill passed by a large majority, but the Christian Peoples Party voted unanimously against it on the grounds that the Bill would undermine marriage.

The Netherlands[225]

The Netherlands adopted a registered partnership law that came into force in 1998 and is now moving towards the legalization of same-sex marriage.[226] The high level of acceptance of registered partnerships among the general population is striking. Among the academics, government officials, gay rights advocates and students I interviewed in November 1998, there was universal agreement that the registered partnership law was very widely accepted. This acceptance is in part a product of a top-down consensus-building reform process , and also reflects the strong value placed on equality and moral tolerance in the Netherlands.[227]

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[225] The discussion of the Netherlands is largely based on interviews conducted in that country and material provided by officials, academics, lawyers and others. As well, I rely on Caroline Forder, "National Report on the Netherlands" for presentation at the Fifth European Conference on Family Law, The Hague, 15–16 March 1999.

[226] Act of 5 July 1997, Netherlands Law Gazette 324, in force 1 January 1998
Act of 17 December 1997, Netherlands Law Gazette 660, in force 1 January 1998.

[227] However, American Ginni Fleck, the Academic Director of the School for International Training in Amsterdam (which provides students from abroad the opportunity to study issues relating to sexuality), indicated that homophobia and discrimination continue to exist in The Netherlands but that they are more subtle than in the United States. Fleck said that there is not the same fear of "gay-bashing" as exists in the United States, but that the subtle homophobia among the Dutch is more difficult to address.

As in virtually all other western legal cultures, there was religious and moral opposition to the registered partnership law. After the law was passed, one official refused to register a same-sex couple because of moral opposition to such a union. (E. Greuzige, the Registrar of Amsterdam, said that any official who refused to register a same-sex partnership should get another job.[228]) Opinion among those I interviewed varied as to the importance of religion as a factor in the debates relating to the legal recognition of marriage-like relationships. The planned legalization of same-sex marriage may generate additional controversy on religious or other grounds. One person I interviewed told me about a law professor who has announced that if same-sex marriage is legalized, he will divorce his wife because Dutch marriages will be in some way devalued. Some of those I interviewed, while resigned to same-sex marriage, expressed concern that it will be inconsistent with international norms. But most agreed that it would be generally accepted.

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[228] In *Reference re Marriage Act (Canada)* (1912), 46 S.C.R. 132, Davies J., took a different approach to this issue, supporting the provision of the *Civil Code* that was intended to "ease the conscience of the priest or clergyman" by providing "that he cannot be compelled to solemnize a marriage as to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs. This conscience clause, as I may call it, is a reasonable, fair and necessary one in view of the unrestricted breadth of the officer's power to marry. No one would think it right to place a priest or clergyman in a position to be compelled to celebrate a marriage which the doctrine, belief and discipline of his church forbade him to celebrate."

The debates on same-sex marriage in the Netherlands focus on the issues of discrimination, filiation, and conformity with international norms. The rationale for proceeding with same-sex marriage is to eliminate discrimination against same-sex couples. All those I spoke with agreed that the legalization of same-sex marriage is a symbolic move that will not affect the rights or obligations of same-sex couples. Registered partnerships and other legal reforms have extended almost all the rights and obligations of opposite-sex couples to those in same-sex unions. The few remaining distinctions between registered partnerships and marriage, e.g., registered partners cannot adopt a child from outside the Netherlands, will remain after legalization of same-sex marriage.

The Dutch registered partnership law came into force on 1 January 1998.[229] From that date same-sex or opposite-sex couples wishing to legally formalise their relationship had at least two options: a registered partnership or a cohabitation contract. Opposite-sex couples also have the option of marriage. The availability of registered partnership to opposite-sex couples generated some disapprobation among other European countries, who generally were more supportive of the Nordic model that permits registration by same-sex couples only. Most European countries seem to accept registered partnership for same-sex couples to eliminate discrimination, but argue that opposite-sex couples have the right to marry and should do so if they want to obtain marital rights and obligations.[230]

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[229] The information below is largely drawn from "Registered Partnership," a brochure published by the Dutch Ministry of Justice in December 1997, and available in several languages, including English, at Registry Offices.

[230] This is my impression based on discussions at the Fifth European Conference on Family Law, Civil law aspects of emerging forms of registered partnerships, 15-16 March 1999, The

The Dutch decided that the registered partnership option (and eventually marriage as well) should be equally available to same-sex or opposite-sex couples, and have expressed the view that their model has worked well in practice.[231]

As in the Nordic countries, in Holland registered partnership and marriage are almost equivalent. A cohabitation contract is entirely different from the registered partnership or marriage, and regulates only what the two parties agree between themselves. In a registered partnership or marriage, the rights and obligations of the couple are largely laid down in law. For example, the obligation to provide maintenance applies automatically to a registered partnership or marriage. But parties to a cohabitation contract decide for themselves whether they wish to make arrangements in regard to maintenance. A registered partnership has legal consequences for the partners, in relation to each other and to other people. For example, a registered partner cannot be forced to give evidence in a court case against the other partner. A cohabitation contract only has legal consequences for the two parties who enter into it. There are no consequences in the relationship to other persons. The contract can however be accepted by others as evidence of cohabitation, for example by a pension fund.

Hague.

[231] *Ibid.*

The statistics on registered partnerships show that many opposite-sex and same-sex couples have chosen this form of relationship.[232] Registration has been possible since mid-January 1998, although in some cases of terminal illness, registration was permitted during the first week of 1998. The numbers of partnership registrations that took place in the first 10 months are set out below.

In those 10 months almost 4000 couples registered their partnerships in the Netherlands. A total of almost 1200 registrations were between women (in Denmark it took more than six years, since the introduction in 1989, before such a number was reached), and a total of just over 1500 registrations were between men (in Denmark two years were needed to reach that number).[233] A total of almost 1300 heterosexual partnerships have been registered in the Netherlands (in Denmark, Norway, Sweden and Iceland only same-sex couples can register their partnership). Dr. Waaldijk notes that, if you take into account that the Netherlands has three times as many inhabitants as Denmark, registered partnership seems equally popular among gay men in these two countries, and more popular among Dutch lesbians than among Danish lesbians.

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[232] The following information is from the Dutch Central Bureau for Statistics, www.cbs.nl/nl/cijfers/kerncijfers/sbv0603a.htm, and from Dr. Kees Waaldijk, University of Leiden, "Registered partnership fairly popular in the Netherlands" (December 1998).

[233] For statistics on Denmark, see online: www.lbl.dk/partstat.htm.

Registered Partnerships in The Netherlands during the first 10 months of 1998:

Month	Female/Female	Male/Male	Female/Male	Total
January	65	119	59	243
February	119	212	159	490
March	120	191	191	502
April	173	175	149	497
May	146	194	145	485
June	146	154	138	438
July	103	143	139	385
August	106	104	106	316
September	130	124	101	355
October	90	91	104	285
Total	1198	1507	1291	3996[234]

Data on the characteristics, motivation, and problems relating to registered partnerships was collected in a study based on a "quick scan" of 153 registered partnerships commissioned by the Ministry of Justice.[235] The 153 partnerships studied were divided equally across the three categories of man/man, woman/woman, and man/woman partnerships. According to this study registered partners are less religious and more highly educated than the general population. As well, their income is higher then the average. For about half of the registered partners, the partnership was the first "official" relationship. About a third had been married and divorced prior to entering into a registered partnership. Most of the partners had already cohabited prior to entering in to the registered partnership. Children were present in about 30% of the families studied.

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[234] As at the end of November 1998, the numbers were: 1,577 man/man partnerships; 1,307 woman/woman partnerships; and 1,353 man/woman partnerships; 4,237 total number of partnerships: The Netherlands Ministry of Justice, *Registered Partnership in the Netherlands: A Quick Scan* (1999) at 13.

[235] The Netherlands Ministry of Justice, *Registered Partnership in the Netherlands: A Quick Scan* (1999) at 27-28.

About 80% of the same-sex registered partners reported that they would have married instead of registering their partnership if that option had been available, and 62% said that they will convert their partnership to a marriage if that option becomes available in the future.

Opening marriage to same-sex couples was considered a symbol of full equality by the couples in the study.

According to the Ministry's study, over half of the registered partners reported that they concluded the partnership for mainly financial or practical reasons, such as inheritance, pension, and buying a home. With regard to emotional considerations, recognition with respect to each other was most important for opposite-sex couples. For same-sex couples, societal recognition was also an important emotional factor. Over 20% of the registered partners reported that there were no emotional considerations involved in their decision to register. Most registered partners reported obtaining information about the legal consequences of registration, but it was found that in fact most did not have a great deal of knowledge in this regard. The study found very few problems with regard to registered partnerships. The problems that do exist relate to the lack of familiarity with registered partnership in society in general and among government authorities in particular.

The Report of Kortmann Commission to Open up Civil Marriage for Persons of the Same Sex, the Hague, October 1997, recommended by a five to three majority that civil marriage be made available to same-sex couples.

The Netherlands is now moving towards the legalization of same-sex marriage by 1 January 2001.[236]

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[236] The original target date was 1 January 2000, but this has been modified. One problem with the original target date was that the computer system could not be ready by then to

On 1 January 1999, Kees Waaldijk, one of the members of the Kortmann Commission, provided the following information on developments in Holland. On 13 November 1998 the Dutch Cabinet approved a Bill to allow adoption by same-sex partners. On 11 December 1998 the Dutch Cabinet approved a Bill to allow same-sex couples to marry. The text of the Bills has not been made public. They are first being sent to the Council of State, for advice. The influential but non-binding advice of the Council of State can be expected around in late March 1999.[237] Depending on the content of the advice, the government will then take several weeks before it can present the Bills to Parliament. Only then they will become public. With these Bills, the current liberal/socialist/democrat coalition government will be a only few months late in honouring its commitment to proceed with same-sex marriage, as set out in the governmental programme of July 1998.[238] The parliamentary procedure to approve the Bills will probably take at least a year, and it is not certain that the Bill will be passed.

The Cabinet's press release of 11 December 1998 reveals some details of the Marriage Bill. The only legal difference between same-sex marriage and different-sex marriage mentioned in the press release relates to paternity: the female spouse of a married woman who bears a child will not be deemed to be the "father" of the child (whereas her male spouse would be "father," even in the absence on any biological link between him and the child). However, it will normally be possible for the female spouse to adopt the child.

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register same-sex marriages. Sylvia Wortmann indicated that it would cost about 13.5 million guilders to change the computer system to accommodate same-sex marriage.

[237] Sylvia Wortmann suggested that the Council of State could give its advice by March 1999.

[238] See "The latest about Listing the Ban on Marriage for Same-sex Couples in the Netherlands" NVIH-COC online: http://www.xs4all.nl/~nvihcoc/marriage.html.

According to the Cabinet's press release of 13 November 1998, adoption by same-sex partners will become possible irrespective of their being married or registered as partners. Intercountry adoptions are excluded from the Bill. (On 1 October 1998 the Hague Adoption Convention entered into force in the Netherlands; it only allows intercountry adoptions by two persons who are married, or by one person, whether single or in a relationship.) Under the terms of the Adoption Bill, same-sex couples wishing to adopt a child must meet the same criteria as opposite-sex couples.

The Cabinet's press release of 11 December 1998 indicates that registered partnership will not be abolished even after the introduction of same-sex marriage. For at least five years it will exist alongside same-sex and opposite-sex marriage. Couples who have registered their partnership already (4,000 couples did in the first ten months of the year, including 1,500 between men, and 1,200 between women), will be able to convert their partnership into full marriage.

Spain[239]

In July 1998, the Spanish autonomous region of Catalonia enacted the *Stable Couples Act*, which came into force in October 1998.[240] The *Stable Couples Act* extends some marital rights and obligations to registered opposite-sex and same-sex couples, or to opposite-sex couples who have lived together for two years or had a child together. In December 1998, Catalonia also enacted cohabitation legislation for persons who provide each other with

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[239] The discussion here is based on Caroline Forder, "National Report on Spain" for presentation at the Fifth European Conference on Family Law, The Hague, 15–16 March 1999, and discussions at that conference.

[240] *The Stable Couples Act*, Act 10/1998, 15 July 1998, in force 23 October 1998.

mutual assistance, other than those cohabiting in a conjugal relationship or married persons.[241] The Act applies to siblings, adults caring for their parents, or friends who are bonded by affection and mutual support, in other words to non-conjugal but affective and interdependent relationships between adults. In order to fall under the provisions of the Act, the parties must have established their relationship by notarial deed or public act, or must have lived together for at least three years. The Act provides for some rights and obligations in relation to support, occupancy of the house on the death of the owner, division of property, and compensation for what we would call unjust enrichment.

The Act is aimed at protecting vulnerable parties and achieving some measure of fairness in cases of economic dependency.

In the meantime, various registered partnership proposals have been put before Spain's National Congress over the past several years. The arguments behind the proposals are based on the principle of equality. Spain's Constitutional Tribunal has handed down judgements extending rights to same-sex partners, but it has stated that there is no constitutional obligation to equalize the treatment of same-sex relationships and marriage. Registered partnership proposals from left-wing parties have been put before the national Parliament but rejected in Congress. The government has since presented its own Bill, which does not go as far in equalizing marriage with registered partnerships as did the rejected proposals. The government's Bill would regulate cohabitation contracts, but leave parties free to determine the property, support, and inheritance consequences of their relationship. The Bill would

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[241] *Mutual Assistance Act*, Act 19/1998, will come into force three months after publication in the Official Journal.

confer public law benefits in the areas of taxation, social security, pensions, and housing on those who had concluded a cohabitation contract.

France

France has been considering a legal regime for cohabiting couples since 1990. The notion of a "contrat d'union civile" (CUC) was developed in 1991 and put before the National Assembly of France in 1992, but was not enacted.[242]

The CUC scheme would have provided quasi-marital status for registered opposite-sex and same-sex cohabitants.[243] Since the early 1990s, similar proposals, all referred to by their abrupt acronyms, have been made: the contrat d'union libre (CUL), contrat d'union sociale (CUS), contrat d'union civile et sociale (CUCS), and pact d'intérêt commun (PIC).

During the fall of 1998 the National Assembly debated a fresh scheme for the extension of benefits, rights and obligations to registered same-sex and opposite-couples. The proposed law is referred to as "PACS," the acronym for pacte civil de solidarité. Despite the several years of debate and discussion about giving legal status to cohabiting couples, the PACS initiative was very controversial and vigorously opposed by the Catholic church and conservatives.[244] Opposition in the National Assembly was led by Christine Boutin, who

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[242] The history of CUCs from 1992-1998 as told by advocates for the scheme is included as an appendix to the anti-CUC book by Christine Boutin, *Le "Mariage" des Homosexuels?: Cucs, Pic, Pacs et autres projects législatifs* (Paris: Criterion, 1998) at 179.

[243] Nicole Guimenzanes, "Family Law in France" in Carolyn Hamilton & Kate Standley, *Family Law in Europe* (London: Butterworths 1995) 125 at 160.

[244] "French Rage Against New Couple Law" *The Observer* (8 November 1998).

argued that PACS would effectively sanction same-sex marriage and undermine the family.[245] The PACS proposal was finally approved by the National Assembly on 9 December 1998.[246] It must now be approved by the Senate before it is returned to the National Assembly for a definitive second reading.

The PACS law would equate the position of spouses and cohabitants to a large degree. It would give legal recognition to cohabiting couples of the same or opposite sex, allowing them to file joint tax returns, share common property rights, and enjoy the same social welfare and succession rights as married couples.

Given the controversy surrounding the introduction of "PACS," it seems very unlikely that same-sex marriage will be legalized in France in the near future (indeed, the PACS initiative itself may not succeed). Even those advocating equal rights for same-sex couples are not supporting same-sex marriage. Sociologist Irène Théry, who is influential with the current French government, supported the elimination of discrimination against same-sex couples. In regard to filiation and marriage, however, she has repeatedly stressed that not all distinctions amount to discrimination. In her testimony before the Senate on family law reform, she commented:

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[245] Her argument that Pacs would undermine the family is set out in Christine Boutin, *Le "Mariage" des Homosexuels?: Cucs, Pic, Pacs et autres projects législatifs* (Paris: Criterion, 1998).

[246] France, Assemblée nationale, proposition de loi, no. 207 (1998) online: http://www.assemblee-nationale.fr.

> En matière do filiation ou de mariage, je ne crois pas que le fait de le considérer comme un lien entre un homme et une femme soit une discrimination à l'égard des couples du même sexe. C'est une distinction qui a du sens, la différance des sexes en ayant un.[247]

Switzerland

Switzerland is mentioned here briefly as an example of a more traditional European country in regard to marriage and marriage-like relationships. The benefits, rights and obligations of marriage are not extended to cohabiting couples, and the dominant view is that "those who do not wish to marry should not be affected by either the rights of spouses or their duties."[248] Unmarried parties may structure their relationship through contracts, wills or the rules of property law; as well, the relationship of an unmarried couple may constitute a partnership, if it is based upon "a contractual relationship to attain a mutually agreed purposes with joint efforts and means," in accordance with the requirements of the Swiss Code of Obligations.[249] Switzerland realizes that it will have to address the issue of recognition of foreign registered partnerships or cohabitation rights as cases arise, but in common with most of the European countries it has not yet determined how to address the private international law issues. As well, Switzerland is reviewing its domestic laws, but it is unlikely that any reforms will be introduced in the near future.[250]

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[247] (Irène Théry) *Droit de la famille: Ne pas se tromper de réforme*, Une journée d'auditions publiques de la commission des Lois de Sénat, Les rapports du Sénat, no.481 (Paris: 1997-98) 17.

[248] Barbara Graham-Siegenthaler, "Family Law in Switzerland" in Carolyn Hamilton & Kate Standley, eds., *Family Law in Europe* (London: Butterworths, 1995) 511 at 546.

[249] *Ibid.* at 546-47.

[250] Comments to author from Margit Moser-Szeless, Swiss Federal Office of Justice, representative of Switzerland at the Fifth European Conference on Family Law, The Hague, 15–16 March 1999.

B. USA

This discussion of developments in the USA focuses on the debates over same-sex marriage and registered partnerships and the attempt to bring about a return to "traditional" marriage by resurrecting the requirement of proving matrimonial fault in order to obtain a divorce.

In the USA, courts have been used by those advocating expanded rights and obligations for same-sex couples, and privately funded interest groups and religious organizations play a bigger role than in other countries.[251] Another striking aspect of family law and policy formation in the USA is the use of constitutional referenda. During the November 1998 elections, voters in Alaska and Hawaii voted to amend the state constitutions to permit the continuing exclusion of same-sex couples from marriage. Again, interest groups and religious organizations took an active role in these referenda. Forming family law and policy in the context of law suits and referenda, and with the heavy involvement of interest groups and religious organizations, is an adversarial process that has resulted in polarization.[252] This is not to say that compromises have not been reached. Hawaii, under the pressure of possible legalization of same-sex marriage as a result of the *Baehr* v. *Miike* case, enacted a "reciprocal beneficiaries" law that grants some marital rights and benefits to registered couples who may

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[251] See, e.g., the large number of "amicus" briefs filed by interest groups and religious organizations in *Baker* v. *Vermont* and *Baehr* v. *Miike*, cases which challenge the exclusion of same-sex couples from the right to marry. The briefs for the *Baker* case are available at http://www.vtfreetomarry.org/, which is Vermont Freedom to Marry Task Force web page. Those filed in the Baehr case are available at http//www.hawaiilawyer.com/same_samesex.htm.

[252] See, e.g., the series run by the *Honolulu Star-Bulletin* on the same-sex marriage court

not legally marry. This law was the *quid pro quo* required to obtain enactment of the constitutional amendment that went to voters in November 1998. Mike Gabbard, chairman of the Alliance for Traditional Marriage accepted the reciprocal beneficiaries law because his primary focus at the time was to ensure passage of the constitutional amendment so that same-sex marriage could be banned.

He said: "The political realities are, obviously at this point, that we're not going to get the constitutional amendment unless those benefits are given." [253]

One issue on which American legislators have been proactive is interjurisdictional recognition of same-sex marriages. Over the past five years, 30 states have enacted laws that explicitly limit marriage to opposite-sex couples, and almost all of these statutes provide that foreign same-sex marriages will not be recognized.[254] As well, the *Defense of Marriage Act* was enacted by the federal government.

The Act defines marriage as heterosexual marriage for the purpose of federal taxes, pensions, and other benefits,[255] and was expressly designed to protect states from being forced

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challenge and the "anti-gay" referendum at www.starbulletin.com.

[253] See "Couple Benefits Package Acceptable Gay Marriage Foe Says" *Honolulu Star-Bulletin*, (16 April 1997).

[254] These statues are cited and analysed in David Orgon Coolidge & William C. Duncan, "Definition or Discrimination? State Marriage Recognition Statutes in the 'Same-sex Marriage' Debate" (1998) 32 Creighton Law Review 3.

[255] Section 3(a) of the Act provides that 'In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.' Article IV, s.1 of the United States Constitution

by the full faith and credit clause of the American Constitution to recognize same-sex marriages.[256]

Prior to November 1998, there was a real possibility that same-sex marriage would be legalized in Hawaii. In 1993, the Supreme Court of Hawaii had ruled in *Baehr* v. *Lewin* that the state's marriage statute violated the equal protection clause of the state constitution by restricting marriage to parties of the opposite sex, and that its constitutionality should be determined under the "strict scrutiny" standard.[257] When the case was then heard on remand, the State argued that it had a compelling interest in: protecting the health and welfare of children and other persons; fostering procreation within a marital setting; assuring recognition of Hawaii marriages in other jurisdictions; protecting the State's public fisc from the reasonably foreseeable effects of State approval of same-sex marriage in the laws of Hawaii; and protecting civil liberties, including the reasonably foreseeable effects of State approval of same-sex marriages, on its citizens.[258] Circuit Judge Chang rejected the State's arguments and ruled that it failed to prove a compelling interest in excluding same-sex couples from marriage or that the impugned law was narrowly drawn to avoid unnecessary abridgments of

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provides that 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.'

[256] Section 2(a) of the Act provides that: "No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

[257] *Baehr* v. *Lewin*, 852 P.2d 44 (Haw. 1993), addressing the constitutionality of Haw. Rev. Stat. Ann. s 572-1 (Michie 1993).

[258] *Baehr* v. *Miike*, 1996 WL 694235 (Haw. Circ. Ct.).

constitutional rights.[259] Much of the State's case and Judge Chang's ruling were centred on the argument that same-sex couples should be excluded from marriage because it is not in the best interests of the child to be raised by a same-sex couple.

Judge Chang canvassed extensive expert evidence on the implications for children of being raised in by a same-sex couple and concluded that the State's argument on this point was untenable. The appeal of *Baehr* v. *Miike* to the Supreme Court of Hawaii is pending but has been rendered moot by subsequent events.

In the spring of 1997, while *Baehr* v. *Miike* was on appeal to the Supreme Court of Hawaii, Hawaiian legislators adopted a law to amend the constitution to allow legislators to limit marriage to couples of the opposite sex.[260] The proposed constitutional amendment went to the voters for approval in November 1998 and was approved by a two-thirds majority. A similar constitutional amendment was approved by a large majority of voters in Alaska in response to an ongoing constitutional challenge to the restriction of marriage to opposite-sex couples.[261]

In the wake of the constitutional amendments in Hawaii and Alaska, same-sex marriage now seems, at best, a distant and faint possibility in the USA, but registered partnership has gained a foothold.

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[259] *Baehr* v. *Miike*, 1996 WL 694235 (Haw. Circ. Ct.).

[260] *Act Proposing a Constitutional Amendment Relating to Marriage*, 1997 HI H.B. 117.

[261] *Brause and Dugan* v. *Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super.).

Hawaii legislators enacted a "reciprocal beneficiaries" law, which came into force on 1 July 1997.[262] Although proposals for registered partnership laws have been made in the U.S. at least since 1965,[263] Hawaii was the first American state to enact such a scheme.

Municipalities have also created registered partnership laws for matters within their jurisdiction, e.g., housing, benefits for municipal employees, and requirements for parties who tender for municipal contracts. San Francisco even performs "wedding" ceremonies to solemnize municipal domestic partnership registrations.[264]

Hawaii's reciprocal beneficiaries law sets out the following "findings" in section 2:

> The legislature finds that the people of Hawaii choose to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman. The legislature further finds that because of its unique status, marriage provides access to a multiplicity of rights and benefits throughout our laws that are contingent upon that status. As such, marriage should be subject to restrictions such as prohibiting respective parties to a valid marriage contract from standing in relation to each other, i.e. brother and sisters of the half as well as to the whole blood, uncle and niece, aunt and nephew.
>
> However, the legislature concurrently acknowledges that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from marrying.

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[262] *An Act Relating to Unmarried Couples*, 1997 HI H.B. 118, in force 1 July 1997.

[263] "Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution" (1979) 128 University of Pennsylvania Law Review 193 at 213, footnote 130.

[264] Diana Walsh, "S.F. OKs Same-sex Weddings: Only Registered Domestic Partners are Eligible" *San Francisco Examiner* (30 January 1996) A1.

For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals who are of the same gender. Therefore, the legislature believes that certain rights and benefits presently available only to married couples should be made available to couples comprised of two individuals who are legally prohibited from marrying one another.

Section 5 of the Act imposes the following requirements on those who want to enter into a reciprocal beneficiary relationship: each party must be at least 18 years old; neither party may be married or a party to another reciprocal beneficiary relationship; the parties must be legally prohibited from marrying one another; each party must have freely consented to the reciprocal beneficiary relationship, without force, duress, or fraud; and each party must sign a declaration of reciprocal beneficiary relationship. Section 7 provides that either party may unilaterally terminate the reciprocal beneficiary relationship at any time.

Under Hawaii's law, non-conjugal couples, e.g., two sisters, may register as reciprocal beneficiaries but heterosexual couples who would prefer to register as reciprocal beneficiaries rather than marry may not do so. This aspect of Hawaii's law distinguished it from the registered partnership laws in the Nordic countries, which open registration to same-sex couples outside the prohibited degrees only, and from the Dutch law, which allows registration only by same-sex or opposite-sex couples outside the prohibited degrees.

The statute extends various marital rights and obligations that are within state jurisdiction to reciprocal beneficiaries, including rights and obligations in relation to health insurance, hospital visitation, health care decisions, insurance policies, succession, death benefits, and bereavement leave.

The statute provides for the inclusion of the minor dependant children of a reciprocal beneficiary in "family" health coverage and insurance policies. The marital rights and obligations created by Hawaii's reciprocal beneficiary scheme are far less extensive than those granted to same-sex couples in such jurisdictions as Denmark, Sweden or Holland, partly because of resistance to a more expansive scheme and partly because Hawaii, as a member state of a federation, is limited to matters within state legislative competence.

After Hawaiians ratified the constitutional amendment allowing state legislators to ban same-sex marriage, however, the state's governor, Ben Cayetano, announced that he would push for an expanded registered partnership law, expressing the view that registered partnership is the best way to end the divisive same-sex marriage debate.[265]

Financial support from family members and government and employee benefits connected with marriage or marriage-like relationships are important to Americans. The USA population is more economically stratified than that of Canada or indeed any other industrial country. The United Nations 1998 Human Development report included a new index of poverty in industrial countries, which showed that some 7.17% of the population in industrial countries is poor and that levels of deprivation have little to do with the average income of the country. The United States, with the highest average income of the countries ranked, has the highest population share experiencing human poverty. The Netherlands, which has an average income similar to that in the United Kingdom, has one of the lowest rates of human poverty while the United Kingdom has one of the highest.

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[265] Mike Yuen, "Same-sex Marriage Debate Rages on, Now Over Domestic Partnership Bill" *Honolulu Star-Bulletin* (6 November 1998).

Canada's rate falls between that of the United States and that of The Netherlands.[266] The United States lacks universal health care, and the opportunity to obtain health insurance coverage through one's partner may therefore be more significant in the United States than in Canada, where single persons have ready access to their own government supported health insurance coverage.

Many American states have strongly resisted the legal recognition of marriage-like relationships, particularly same-sex cohabitation.

In part because of this resistence and in part because of concerns about the negative impact of marriage breakdown on children, some states have introduced measures aimed at strengthening traditional marriage.

In Louisiana, "covenant marriage" was adopted in 1997,[267] and Arizona too has now introduced a covenant marriage scheme, effective 21 August 1998.[268] Covenant marriage is a more binding form of marriage than "regular" marriage. Those entering into a covenant marriage must receive counseling first. The grounds of divorce of a covenant marriage are stricter, and the parties sign a covenant that provides for marriage counseling prior to any divorce action, damages for breach of the covenant to undergo counseling, and dismissal of a divorce action if there has not been counseling.

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[266] See UNDP, Human Development Report (1998) http://www.undp.org/hdro/.

[267] *An Act Relative to Covenant Marriage*, 1997 La. Sess. Law Serv. 1380 (West) codified at La. Rev. Stat. Ann. Ss 9: 272-75, 307-09 (West Supp. 1998).

[268] AZ. ST. T. 25, Ch. 7, added by Laws 1998, Ch. 135, s.1.

Covenant marriage was touted as an antidote to high divorce rates,[269] but analysts of the legislation have expressed serious concerns about its efficacy in this regard and about its unintended consequences.

One critic of covenant marriage writes:

> The premarital counseling that it mandates it too shallow to alert couple to their incompatibilities, and forced marital counseling for married couples in marital difficulties has, in the past, proven unable to forestall divorce. Moreover, the Act's more difficult and time-consuming divorce regime is reminiscent of the one in place during the 1970s, when divorce rates were in fact higher than at present; the same escape techniques used then can be used now by those who elect covenant marriages. The improbability that the Act will accomplish its goal does not mean that it is neutral in its effects, however. Its marital counseling provisions, if regarded as a requirement, could place abused spouses at risk, and its divorce regime will increase the conflict, litigiousness, and expense of divorce.[270]

The concerns raised with regard to spousal violence and increased conflict and expense deserve serious consideration. The skepticism with regard to the effect of covenant marriage on divorce rates is consistent with studies showing that there is no relation between the strictness of leniency of divorce law and the incidence of marriage breakdown.[271] It should also be pointed out that the drafters of the covenant marriage law gave little consideration to private

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[269] Katherine Shaw Spaht, the law professor who drafted the covenant marriage legislation, outlines "the potential covenant marriage has for changing the culture of America from one of divorce to one of marriage" in "Why Covenant Marriage? A Change in Culture for the Sake of the Children" (1998) 46 Louisiana Bar Journal 116. In footnote 41 of this article, Spaht makes an interesting statement: "Three people in Canada have expressed interest in covenant marriage legislation and at least one has promised that it will be introduced, which would mean that covenant marriage would be national legislation."

[270] Jeanne Louise Carriere, "'It's Déjà Vu All Over Again': The Covenant Marriage Act in Popular Cultural Perception and Legal Reality" (1998) Tulane Law Review 1701.

[271] Max Rheinstein, *Marriage Stability, Divorce and the Law* (Chicago: U of Chicago P, 1972) at 406, and J. Commaille et al., *Le Divorce en Europe occidentale: La Loi et le nombre* (Paris: I.N.E.D.), 1983) at 226.

international law issues,[272] and it is doubtful that the restrictions on divorce would be enforced by a sister state or by a foreign country with jurisdiction to grant a divorce.

The American initiatives discussed above provide questionable models for law reformers. It is unlikely that the covenant marriage law adopted by Louisiana will be effective in reducing divorce rates or in improving outcomes for children.

It is also unlikely that the processes adopted to respond to the claims of those in same-sex relationships will generate high levels of consensus or social cohesion. Attempts to reform the law relating to same-sex couples have been very controversial in the USA, the debates highly polarized, and little progress made. More helpful models of reform processes that generate consensus and laws that are responsive to current demographic patterns and social values and that more effectively support state objectives are found in the European countries.

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[272] Katherine Shaw Spaht, the law professor who drafted the covenant marriage legislation, admitted this when presenting a paper at the Conference on Interjurisdictional Marriage Recognition, Creighton University School of Law, Omaha, Nebraska, on 19 June 1998.

VII. CONCLUSIONS AND ISSUES FOR FURTHER RESEARCH

> It is essential to ensure that, in seeking an alternative to one culture-bound category, "the family," we do not unwittingly substitute others which are as much products of a particular time and place.[273]

The objective of this report was to provide a conceptual framework for further in-depth research and the generation of recommendations for law reform in relation to issues identified as inconsistent with current accepted values and objectives. In some jurisdictions, questions relating to cohabitation, registered partnership, and same-sex marriage are framed as whether to extend the rights and obligations of marriage to couples in conjugal relationships. However, a broader review of the family law and policy should be taken. Instead of simply extending the rights and obligations of marriage or opposite-sex cohabitation to same-sex couples, Canada should consider whether its scheme of privileging both marriage and other conjugal relationships is consistent with current social values and legitimate state interests.

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[273] R. Dingwall & J.M. Eekelaar, "Families and The State: An Historical Perspective on the Public Regulation of Private Conduct" (1988) 10 Law & Policy 341 at 359.

Aiming state support at conjugal couples whether married or unmarried, opposite-sex or same-sex, may be an indirect way of supporting families who have developed economic interdependency or raised children together. Whether the state can or should direct its support more precisely is a social policy question to be considered. It may be that marriage, registration, and cohabitation are the only "markers" that the state can reasonably be expected to identify, and that it would simply be too difficult to direct benefits on the basis of whether a family fulfills functions that the state has a legitimate interest in supporting.[274]

My research suggests that the following issues should be targeted for more detailed consideration with a view to proceeding with a coherent strategy of legal reform in relation to marriage and marriage-like relationships:

a) what data should Statistics Canada be collecting in relation to same-sex couples and adults living in non-conjugal but affective and interdependent relationships, and how should the "census family" be defined;

b) whether marital rights and obligations should be further extended to opposite-sex and same-sex couples;

c) whether marital rights and obligations should be extended to adults living in non-conjugal but affective and interdependent relationships;

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[274] In *Egan*, at para. 25, La Forest J. wrote: "I do not think the courts should attempt to require meticulous line drawing that would ensure that only couples that had children were included. This could impose on Parliament the burden of devising administrative procedures to ensure conformity that could be both unnecessarily intrusive and difficult to administer..." In *Miron*, at para. 167, McLachlin J. said on this issue: "The standard which the legislator must meet is not perfection, but reasonableness."

d) whether the state should continue to support couples, conjugal or otherwise, or instead individualize more government benefits and link "family" benefits, rights, and obligations to responsibility for dependent children;

e) whether the state should maintain or modify its role in regulating marriage and divorce;

f) whether a scheme of registered domestic partnerships should be introduced;

g) which marital rights and obligations should require registration or marriage, and which should depend only on cohabitation;

h) whether same-sex marriage should be legalized; and

i) the private international law issues relating to registered partnership and same-sex marriage, including i) to what extent should Canada recognize foreign registered partnerships, cohabitation rights, or same-sex marriages; ii) to what extend would Canadian registered partnerships, cohabitation rights, or same-sex marriages be recognized by foreign states; iii) if Canada replaced civil marriage with registered partnerships and, at the option of the parties, religious marriage, would this affect the willingness of foreign states recognize the registered partnerships.

My general views on these issues at this point can be summarized briefly. The full range of marital benefits, rights, and obligations should be available to same-sex couples on the basis of a registered partnership scheme. Some exceptions might have to made in regard to international issues. This recommendation is based on the principle of equality, respect for the autonomy and right to choose of same-sex couples, and the interest of the state in supporting families and promoting social cohesion. Opposite-sex couples currently have the option of obtaining the full range of marital rights and obligations through marriage.

Whether they should have the option of doing so by means of a registered partnership scheme as well should be considered. Most countries with registered partnership schemes limit them same-sex couples in order to address the problem of discrimination against such couples. Whether registered partnerships should play the further role of providing an additional option to opposite-sex couples should be considered.

Couples who choose not to marry or register their partnership should not be entitled to the full range of marital rights and obligations, but some benefits, burdens, rights, and obligations should continue to be extended to unregistered cohabiting couples, whether opposite-sex or same-sex, in order to protect vulnerable parties and in order to reduce public expenditure on social benefits. The difference between the benefits, burdens, rights, and obligations associated with marriage or registered partnerships and those associated with cohabiting couples should be comparable to the difference between the "expectation" measure of damages in contract, where the parties have willingly assumed an obligation, and the "reliance" measure of damages in tort.

Distinguishing between the legal regime for married or registered couples and the regime for cohabitants would respect to some extent the autonomy of parties while providing some protection for vulnerable parties. Parties who have not undertaken the responsibilities of marriage or registered partnership arguably should not be entitled to all the benefits of those relationships, e.g., the right to sponsor one's partner for immigration purposes. Cohabitation agreements should continue to be available to couples who prefer to structure their relationship by that means rather than through registration, marriage, or the "default" rules in place for cohabiting couples.

Adults who are living together in an interdependent non-conjugal relationship and raising a dependent child together should continue to have the full range of "family" government benefits available by reason of the parent-child relationship. Whether such adults are raising a dependent child or not, the right to enter into a cohabitation agreement governing their mutual rights and obligations should be explicitly given to such couples by law. Consideration should be given to extending some protection to dependent parties in such relationships, as Catalonia has done in its *Mutual Assistance Act*. In particular, some protection should be given against the sudden loss of financial support or housing as the result of the termination of the relationship by death or separation.

Finally, marriage should be maintained as is for now but consideration should be given to a) phasing out civil marriage, maintaining a registered partnership scheme as mechanism for conferring what was once marital status, and ceding marriage to religious organizations; and b) legalizing same-sex marriage. The phasing out of civil marriage is something to consider in the long-term. There is no pressing need to move forward in this area now. Similarly, same-sex marriage is a divisive issue, and many Canadians are not ready to consider this possibility. The Alberta government, e.g., announced on 18 March 1999 that it would invoke the notwithstanding clause of the Constitution to prevent recognition of same-sex marriage.[275] If the Netherlands legalizes same-sex marriage, the rest of the world may gradually come to accept it, but most observers feel this will take a long time.[276]

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[275] Jill Mahoney, "Alberta Government Decides to Say No to Same-sex Marriages" *The Globe and Mail* (19 March 1999).

[276] Based on, *inter alia*, informal discussions at the Fifth European Conference on Family

Currently, registered partnership is available to address the problem of discrimination against same-sex couples, and is more likely to be an acceptable solution than same-sex marriage. When the Alberta government announced its opposition to same-sex marriage, at the same time it announced that it was planning to study the concept of "registered domestic partnerships."[277] Registered partnerships, then, are probably a more widely acceptable solution, at least on an interim basis, to address the problem of discrimination against same-sex couples than same-sex marriage.

Law, The Hague, 15–16 March 1999.

[277] Jill Mahoney, "Alberta Government Decides to Say No to Same-sex Marriages" *The Globe and Mail* (19 March 1999).

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Mutual Assistance Act, Act 19/1998, will come into force three months after publication in the Official Journal

Iceland

Confirmed Cohabitation Act, Law and Ministerial Gazette A No. 97/1996

Spain

The Stable Couples Act, Act 10/1998, 15 July 1998, in force 23 October 1998
Mutual Assistance Act, Act 19/1998, will come into force three months after publication in the Official Journal

Sweden

Registered Partnership (Family Law) Act, in force 7 June 1994

United States - Federal

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Hawaii

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APPENDICES

Appendix A sets out some of the federal, provincial, and territorial rules governing marriage. Appendix B covers some of the rules of opposite-sex cohabitation, appendix C addresses same-sex cohabitation, and appendix D deals with non-conjugal cohabitation. Full citations for all of the statutes and cases referred to in the appendices are set out in the tables of statutes and cases. The appendices are by no means a comprehensive statement of all the laws governing marriage and marriage-like relationships. Only a small selection of the large number of statutes governing government pensions and benefits were included. The appendices set out a basic legal framework in regard to such issues as family formation, taxation, health care consent, immigration, spousal support, marital property, and succession. The appendices make the point that important differences between the laws governing marriage and those governing marriage-like relationships remain. As well, they make clear that the laws governing marriage and marriage-like relationships vary significantly across Canada. The term "N/A" is used to indicate that a particular issue is not within the competence of the particular government or is otherwise inapplicable.

APPENDIX A
LEGAL RULES GOVERNING MARRIAGE

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
How is relationship formed?	Formal validity governed by *lex loci celebrationis*: *Keddie* v. *Currie*	Marriage ceremony: *Marriage Act*, s. 8	Marriage ceremony: *Marriage Act*, s. 16	Marriage ceremony: *Marriage Act*, s. 12	Marriage ceremony: *Marriage Act*, s. 10	Marriage ceremony: *Solemnization of Marriage Act*, s. 12	Marriage ceremony: *Marriage Act*, s. 7	Marriage ceremony: *Solemnization of Marriage Act*, s. 23	Marriage ceremony: *Marriage Act*, ss. 4, 5	Marriage ceremony: *Marriage Act*, s. 3	Marriage ceremony: *Civil Code*, art. 401 Formal validity: *Civil Code*, art. 3088	Marriage ceremony: *Marriage Act*, s. 12	Marriage ceremony: *Marriage Act*, s. 7
Who May enter relationship?	A man and woman: *Layland* v. *Ontario* Only parties outside prohibited degrees: *Marriage (Prohibited Degrees) Act*, and who have capacity under relevant common law rules foreign marriages must comply with rules of essential validity of party's domicile: *Schwebel* v. *Ungar*	Only parties who meet requirements of provincial marriage statute and who have capacity under federal law and common law A man and woman: *Layland* v. *Ontario*	Only parties who meet requirements of provincial marriage statute and who have capacity under federal law and common law A man and woman: *Layland* v. *Ontario*	Only parties who meet requirements of provincial marriage statute and who have capacity under federal law and common law A man and woman: *Layland* v. *Ontario*	Only parties who meet requirements of provincial marriage statute and who have capacity under federal law and common law A man and woman: *Layland* v. *Ontario*	Only parties who meet requirements of provincial marriage statute and who have capacity under federal law and common law A man and woman: *Layland* v. *Ontario*	Only parties who meet requirements of provincial marriage statute and who have capacity under federal law and common law A man and woman: *Layland* v. *Ontario*	Only parties who meet requirements of provincial marriage statute and who have capacity under federal law and common law A man and woman: *Layland* v. *Ontario*	Only parties who meet requirements of provincial marriage statute and who have capacity under federal law and common law A man and woman: *Layland* v. *Ontario*	Only parties who meet requirements of provincial marriage statute and who have capacity under federal law and common law A man and woman: *Layland* v. *Ontario*	Only parties who meet requirements of *Civil Code* and who have capacity under federal law A man and woman, *Civil Code*, art. 365	Only parties who meet requirements of provincial marriage statute and who have capacity under federal law and common law A man and woman: *Layland* v. *Ontario*	Only parties who meet requirements of provincial marriage statute and who have capacity under federal law and common law A man and woman: *Layland* v. *Ontario*
Is partner a competent/compellable witness?	No: *Canada Evidence Act*, s. 4	Yes: *Alberta Evidence Act*, s. 4, but	Yes: *Evidence Act*, s. 7, but	Yes: *Evidence Act*, s. 5, but	Yes: *Evidence Act*, s. 3(1), but	Yes: *Evidence Act*, s. 2, but	Yes: *Evidence Act*, s. 3, but	Yes: *Evidence Act*, s. 45, but	Yes: *Ont. Evidence Act*, s. 8	Yes: *Evidence Act*, s. 4, but		Yes: *Sask. Evid. Act*, s. 35, but	Yes: *Evidence Act*, s. 3(1), but

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
		commun'ns between couple privileged: s. 8	commun'ns between couple privileged:s. 8, and *Family Rel. Act*, s. 19	commun'ns between couple privileged: s. 10	commun'ns between couple privileged: s. 5	commun'ns between couple privileged: s. 6	commun'ns between couple privileged: s. 6	commun'ns between couple privileged: s. 49		commun,ns between couple privileged: s. 9		commun'ns between couple privileged: s. 36	commun'ns between couple privileged: s. 6
Can couple adopt?	N/A	Yes:*Child Welfare Act*, s. 58, and *Adult Adopt. Act*, s. 6	Yes: *Adoption Act*, ss. 5, 29	Yes: *Child and Fam. Serv. Act*, s. 66	Yes: *Family Serv. Act*, ss. 1, 66	Yes: *Adopt. Of Children Act*, s. 3	Yes: *Child Welfare Act*, s. 89	Yes: *Child and Fam. Serv. Act*, s. 72	Yes *Child and Fam. Servs. Act*, s. 136(1)	Yes *Adoption Act*, s. 3(2)	Yes *Civil Code*, art. 546	Yes *The Adop. Act*, ss. 2(1), 17	Yes *Children's Act*, s. 79
Can partner give health care consent?	N/A	No: *Re A.M.S.* and *Re T.*	Yes: *Health Care Consent Act*, s. 16 "Not yet in force"	No: *Re A.M.S.* and *Re T.*	No: *Re A.M.S.* and *Re T.*	Yes: *Adva. Health Dir. Act*, s. 10	No: *Re A.M.S.* and *Re T.*	Yes: *Hospitals Act*, s. 54(2)	Yes: *H.C.C.A.*, s. 20		Yes: *Civil Code*, art. 15	Yes: *Hosp. Stand. Regs*, s. 55(1)	Yes: *Health Act*, s. 45
Can partner sponsor immigration?	Yes: Immigration Regs., ss. 5, 2(1)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Is couple entitled to benefits/pensions available to families?	Yes: *Can. Pension Plan Act*, s. 2(1), etc.	Yes: *L.A.P.P.A.*, s. 1 and *Widow's Pension Act*, ss. 1, 3	Yes: *P.C.A., P.M.A., P.P.A., P.T.A., L.A.A.* s. 1, and *P.B.A*, s.1	Yes: *Teachers Pens. Act*, ss. 8, 10, 27(4.1) and *C.S.S.A.*, s. 30 and *Pens. Ben. Act*, s. 18(4)(1)	Yes: *Pension Benefits Act*, ss. 1, 43, and *Teacher's Act*, ss, 1, 14		Yes: *Comm. Emp. Benefits Act* and *Legislative Assembly Retirement Allowance Act*, s. 1	Yes: *Pension Benefits Act*, ss. 1, 52	Yes: *Ont. Pension Benefits Act*, s. 1(1)	Yes: *C.S.S.A.*, ss. 1(b), 13	Yes: Quebec Pension Plan, s. 91	Yes: *Sask. Pens. Plan Act*, s. 16	Yes: *Leg. Assem. Allowances Act*, s. 1
Is couple entitled to "family" health insurance?	N/A	Yes: *Health Care Ins. Regs*, s. 1	Yes: *Medicare*, s. 1	No: *Health Serv. Ins. Act*, ss. 2, 20, 21	Yes: *Med. Serv. Payment Regs.*	Maybe: *Med. Care Ins. Act*, ss. 19(1), 2(d)	No: *Med. Care Act*, s. 3(1)	No: *Health Serv. and Ins. Act*, s. 3	Yes: *Health Ins. Act Regs.*, s. 1.1(1)	Yes: *Health Serv. Paym. Act Regs.*, ss. 12, 13		Yes: *S.M.C.I.A.*, s. 2(f)	Yes: *H.C.I.P.A. Regs.*, s. 2(1)(b)
Is couple entitled to "family" auto insurance?	N/A	Yes: *Insurance Act*, s. 301	Yes *Insurance Act*, ss. 140, 168	Yes: *Insurance Act*, s. 239	Yes: *Insurance Act*, ss. 232, 255	Yes: *Auto Insurance Act*, s. 33	No: *Insurance Act*, s. 131	Yes: *Insurance Act*, s. 139	Yes: *Insurance Act*	Yes: *Insurance Act*, ss. 2, 3	Yes: *Automobile Insurance Act*	Yes: *Auto Accident Insurance Act*, s. 22	Yes: *Insurance Act*, ss. 73, 170

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
Is dependent partner deductible for tax purposes?	Yes: *Income Tax Act*, ss. 122.6, 252(4)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Are special spousal tax rules available to couple?	Yes: *Income Tax Act*, ss. 122.6, 252(4)	Yes: *Income Tax Act*, s. 13.2	Yes: *Income Tax Act*, ss. 6(3), 9, 11		Yes: *Income Tax Act*, s. 2.4(1)			Yes: *Income Tax Act*, s. 12	Yes: *Income Tax Act*, s. 7(3.1)			Yes: *Income Tax Act*, s. 4(k)	
Does partner inherit on intestacy?	N/A	Yes: *Intestate Succession Act*, ss. 1, 2	Yes: *Estates Admin. Act*, s. 83	Yes: *Dep. Relief Act*, s. 2 and *I.T.A.*, ss. 2-4	Yes: *Devol. Estat. Act*, s. 22	Yes: *Rules of Court*, Rule 56.02 and *Intest. Succ. Act*, s. 1	Yes: *Intest. Succ. Act*, s. 2	Yes: *Intest. Succ. Act*, ss. 4, 5	Yes: *Succ. Law Ref. Act*, ss. 1, 44	Yes: *Probate Act*, ss. 87-89	Yes: *Civil Code*, art. 666	Yes: *Intes. Succes. Act*, s. 6	Yes: *Intest. Act*, s. 2
Can partner claim share of estate if not sufficiently provided for in will?	N/A	Yes: *Family Rel. Act*, ss. 1, 3	Yes: *Wills Variation Act*, s. 2	Yes: *Dom. Relat. Act*, s. 2	Yes: *Prov. for Depend. Act*, ss. 1, 2(1.2)	Yes: *Fam. Relief Act*, s. 3	Yes: *Dom. Relat. Act*, ss. 1, 2	Yes: *Test. Fam. Maint. Act*, ss. 2, 3	Yes: *Succ. Law Ref. Act*, ss. 1, 57, 58	Yes: *D.D.P.R.A.*, ss. 1(d), 2	Yes: *Civil Code*, arts. 585 and 684		Yes: *Depend. Relief. Act*, ss. 1, 2
How is relationship dissolved?	Divorce: *Divorce Act*, s. 6(1), applies across Canada Annulment, pursuant to law in force in each province at time of entry into confederation, as amended by fed. govt.	In addition to a divorce or annulment may obtain a judicial separation, which does not dissolve marriage: *Domestic Relations Act*, s. 6	Divorce or annulment Judicial Separation: *Family Relations Act*, ss. 5, 7, 8, 10	Divorce or annulment *Family Relat. Act*, s. 10	Divorce or annulment *Divorce Crt. Act*	Divorce or Annulment	Divorce or Annulment Judicial Separation: *Domes. Relat. Act*, s. 2	Divorce or Annulment	Divorce or Annulment May enter into separation agreement, but does not dissolve marriage: *Family Law Act*, s. 54	Divorce or annulment Separation Agreement: *Family Law Reform Act*, s. 47	Divorce or annulment Annulment: *Civil Code*, art. 380 May obtain Separation from bed and board, but does not dissolve marriage: *Civil Code*, art. 493	Divorce or annulment	Divorce or annulment
Is judicial review of terms of dissolution required?	Yes: *Divorce Act*, s. 11,		Not required but possible:		Not required but possible:			N/A	Not required but possible:	Not required but possible:			

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
	applies across Canada		*Family Relations Act*, ss. 65, 68		*Divorce Crt. Act*				*Family Law Act*, s. 56(1)	*Family Law Reform Act*, s. 49			
Is dependent partner entitled to spousal support?	Yes: *Divorce Act*, ss. 2(1), 15.2(1)	Yes: *Domestic Reations Act*, ss. 6, 8, 15	Yes: *Family Relat. Act*, ss. 1(1), 4(1), 121, 122	Yes: *Family Maintenance Act*, s. 1(1)	Yes: *Family Relations Act*, s. 112	Yes: *Family Law Act*, ss. 35, 36	Yes: *Domestic Relations Act*, s. 10 and *Maint. Act*, ss. 2, 3	Yes: *Family Maint. Act*, ss. 2, 3 and *Alimony Act*, s. 2	Yes: *Family Law Act*, s. 33	Yes: *Family Law Reform Act*, s. 15	Yes: *Civil Code*, arts. 392, 396, and 511	Yes: *Family Maintenance Act*, ss. 2, 4	Yes: *Family Prop. and Support Act*, ss. 35, 31
Can parties contract out of spousal support right and obligation?	Maybe: *Divorce Act*, s. 15.2(4)(c)	Yes: *Domestic Relations Act*, s. 23	Yes: *Family Relations Act*, ss. 1(1), 89, 121, 122	Yes: *Family Maint. Act*, ss. 9(2), 1(1)	Yes: *Family Servs. Act*, s. 115(5)	Yes: *Family Law Act*, s. 62		Yes: *Family Maintenance Act*, s. 4, 52	Yes: *Family Law Act*, s. 52	Yes: *Family Law Ref. Act*, ss. 45, 18(4)	Yes: *Civil Code*, art. 495	Yes: *Family Maintenance Act*, ss. 7, 9	Yes: *Family Property and Support Act*, ss. 1, 58
Does each partner have right to claim custody or access?	Yes: *Divorce Act*, ss. 16, 2(1)	Yes: *Domestic Relations Act*, ss. 55, 56	Yes: *Family Relations Act*, ss. 34, 1(1)	Yes: *Family Maintenance. Act*, s. 39(2)	Yes: *Family Services Act*, ss. 1, 129	Yes: *Children's Law Ref. Act*, ss. 26, 27, 69(4)(a)-(d)	Yes: *Domestic Relations Act*, s. 27	Yes: *Family Maint. Act*, s. 18	Yes: *Children's Law Ref. Act*, s. 20(1)(5)	Yes: *Cust. Juris. And Enforce. Act*, ss. 3, 4	Yes: *Civil Code*, art. 599	Yes: *Children's Law Act*, ss. 2(1), 6	Yes: *Children's Act*, ss. 1, 33
Does custodial parent have right to child support?	Yes: *Divorce Act*, ss. 2(1), 15.1	Yes: *Maint. Order Act*, ss. 2(2)-(3), 3(2)(a), 4(1)(f)	Yes: *Familiy Relat. Act*, ss. 1(1), 88, 121, 122	Yes: *Family Maint. Act*, ss. 1(1), 36(1)(2)	Yes: *Family Servs. Act*, ss. 1, 113	Yes: *Family Law Act*, s. 37	Yes: *Domes. Relat. Act*, s. 28(4)	Yes: *Family Maint. Act*, ss. 2(1), 8	Yes: *Family Law Act*, ss. 31, 33	Yes: *Family Law Ref. Act*, ss. 1, 16-18	Yes: *Civil Code*, art. 586	Yes: *Family Maint. Act*, ss. 2, 3	Yes: *Family Prop. and Supp. Act*, ss. 1, 32
Can parties contract out of child support right and obligation?	Maybe: *Divorce Act*, s. 15.1(5)(a)		Yes: *Family Relat. Act*, ss. 1(1), 93		Yes: *Family Services Act*, ss. 115(5)	Yes: *Family Law Act*, s. 62		Yes, subject to best interests of child: *Family Maint. Act*, ss. 31, 52	Yes, subject to best interests of child: *Family Law Act*, ss. 52, 56	Yes: *Family Law Ref. Act*, s. 45	Yes: *Civil Code*, art. 587.3	Yes: *Family Maint. Act*, ss. 7, 9	Yes: *Family Prop. and Supp. Act*, ss. 1, 58
Does each partner have right to claim a share of property acquired during relationship?	N/A	Yes: *Matr. Prop. Act*, ss. 1, 3, 37(1) and *Domes. Relat. Act*, s. 21	Yes: *Family Relations Act*, s. 56	Yes: *Marital Property Act*	Yes: *Marital Property Act*	Yes: *Family Law Act*, ss. 2(1), 21	Yes: *Domestic Relat Act*, ss. 16-18	Yes: *Matrim. Prop. Act*, ss. 1, 12(1)	Yes *Family Law Act*, ss. 1(1), 5(1)	Yes *Family Law Ref. Act*, s. 4	Yes *Civil Code*, art. 416	Yes *Matrim. Prop. Act*, ss. 2, 4	Yes *Family Prop. and Supp. Act*, ss. 1, 6

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
Can parties contract out of right to property division?	N/A	Yes: *Matr. Prop. Act*, ss. S. 37(1), 1, 8(g)	Yes: *Family Relat. Act*, s. 61	Yes: *Marital Property Act*	Yes: *Marital Property Act*, ss. 34, 36	Yes: *Family Law Act*, s. 62	Yes: *Domestic Relat. Act*, s. 18	Yes: *Matrimonial Prop. Act*, s. 4(1)	Yes: *Family Law Act*, ss. 52, 54	Yes: *Family Law Ref. Act*, s. 45	Not in regard to family patrimony, except a party may renounce rights in family patrimony when relationship has ended: *Civil Code*, art. 423	Yes *Matrim. Prop. Act*, s. 4(e)	Yes *Family Prop. and Supp. Act*, ss. 1, 58

APPENDIX B
LEGAL RULES GOVERNING OPPOSITE-SEX COHABITATION

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
How is relationship formed?	N/A	nothing required but may make private contract	nothing required but may make agreement: *Family Relations Act*, s.120.1	nothing required but may make private contract	nothing required but may make private contract	nothing required but may make domestic contract: *Family Law Act*, s. 63	nothing required but may make private contract	nothing required but may make private contract	nothing required but may make cohabitation agreement: *Family Law Act*, s. 53	nothing required but may make contract: *Family Law Ref. Act*, s. 46	nothing required but may enter into partnership agreement or contract: *Beaudoin-Daigneault* v. *Richard*	nothing required but may make private contract	nothing required but may make private contract
Who May enter relationship?	A man and a woman	A man and a woman	A man and a woman	A man and a woman	A man and a woman	A man and a woman	A man and a woman	A man and a woman	A man and a woman	A man and a woman	A man and a woman	A man and a woman	A man and a woman
Is partner a competent/compellable witness?	Yes: *Canada Evidence Act*, s. 4	Yes: *Alta. Evidence Act*, s. 4	Yes: *Evidence Act*, s. 7	Yes: *Evidence Act*, s. 5	Yes: *Evidence Act*, s. 3(1)	Yes: *Evidence Act*, s. 2	Yes: *Evidence Act*, s. 2	Yes: *Evidence Act*, s. 45	Yes: *Ontario Evidence Act*, s. 8	Yes: *Evidence Act*, s. 4		Yes: *Sask. Evidence Act*, s. 35	Yes: *Evidence Act*, s. 3(1)
Can couple adopt?	N/A	No: *Adult Adop. Act*, s. 6 and *Child Welfare Act*	Yes: *Adop. Act*, ss. 5, 29	Yes: *Child and Family Services Act*, s. 66	No: *Family Services Act*, ss. 1, 66	No: *Adop. Of Child. Act*, s. 3(1)(2)	No: *Child Welfare Act*, s. 89 and *RE B.R.T.N.K.*	Yes: *Act Res. Serv. To Child. and Their Fam.*, s. 72(1)	Yes: *Child and Fam. Servs. Act*, s. 136(1)	No: *Adoption Act, ss. 2(1)(c), 3(1)(2)(4)*		Yes: *The Adoption Act*, ss. 2(1)(p), 17(2)	No: *Children's Act*, s. 79(1)(2)
Can partner give health care consent?	N/A	No: *Re A.M.S.* and *Re T.*	Yes: *Health Care Consent*, s. 16 (not in force)	No: *Re A.M.S.* and *Re T.*	No: *Re A.M.S.* and *Re T.*	No: *Advan. Health Dir. Act*, s. 10	No: *Re A.M.S.* and *Re T.*	No: *Hospitals Act*, s. 54(2)	Yes, if a legal "partner": *H.C.C.A.*, s. 20(1)(3)		Yes: as "person who shows a special interest" *Civil Code*, art. 15	No: *Hosp. Standards Regs.*, s. 55(1)	Yes: *Health Act*, s. 45
Can partner sponsor immigration?	Yes: *Immigration Regs.*, 5.2(1), 5	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Is couple entitled to benefits/pensions available	Yes: *Canada*	1) Yes *E.P.P.A.*, s. 1	1) Yes *P.B.A.*, s.1	1) Yes: *T.P.A.*, ss. 8,	Yes: *Pension*		Yes: *Leg. Assem.*	Yes: *Pension Benefits Act*,	Yes: *Pension Benefits Act*,	1) No: *C.S.S.A.*, ss.	Yes: Quebec Pens.	Yes: *Sask. Pens.*	Yes: *Leg. Assem.*

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
to families?	*Pension Plan Act*, s. 2(1), etc.	and *L.A.P.P.A.*, s. 1 2) No *W.P.A.*, ss. 1-3	*P.C.A.*, ss. *15, 20* and *P.M.A.* and *P.P.A.* and *P.T.A.* 2) No *L.A.A.*, s. 1	10, 27(4.1) and *P.B.A.*, s. 18 (4)(1) 2) Maybe *C.S.S.A.*, s. 30	*Benefits Act*, ss. 1, 43 and *Teacher's Act*, ss. 1, 14		*Retiring All. Act*, s. 1	ss. 1, 52	s. 1(1)	1(b), 13 2) Yes: *D.D.P.R.A.*, s. 1(d), 2	Plan, s. 91, etc.	*Plan Act*, s. 16	*Retirement All. Act*, s. 1
Is couple entitled to "family" health insurance?	N/A	Yes: *Health Care Ins. Regs.*, s. 1	No: *Insurance Act*, s. 1	No: *Health Serv. Ins. Act*, ss. 2, 20, 21	No: *Med. Serv. Payment Regs.*	Maybe, if dependant: *Med. Care Ins. Act*, ss. 19(1), 2(d)	No: *Med. Care Act*, ss. 1, 3(1)	Maybe, if resident: *Hosp. Ins. Regs.*, s. 3	Maybe: *Hosp. Ins. Act Regs.*, s. 1.1(1)	Maybe: *H.S.P.A. Regs.*, ss. 12, 13		Yes: *S.M.C.I.A.*, s. 2(f)	No: *H.C.I.P.A. Regs.*, s. 2(1)(b)
Is couple entitled to "family" auto insurance?	N/A	No: *Insurance Act*, s. 301	No: *Insurance Act*, ss. 140, 168	Yes: *Insurance Act*, s. 239	No: *Insurance Act*, ss. 232, 255	No: *Auto Ins. Act*, s. 33	No: *Insurance Act*, s. 131	No: *Insurance Act*, s. 139	Yes: *Insurance Act*, s. 224	Yes: *Insurance Act*, ss. 2, 3	Yes: *Automobile Insurance Act*, art. 2	Yes: *Auto Acc. Ins. Act*, s. 22	No: *Insurance Act*, ss. 73, 170
Is dependent partner deductible for tax purposes?	Yes: *Income Tax Act*, s. 252(4)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Are special spousal tax rules available to couple?	Yes: *Income Tax Act*, s. 252(4)	Yes: *Income Tax Act*, s. 13.2	Yes: *Income Tax Act*, ss. 6(3), 9		Yes: *Income Tax Act*, s. 2. 4(1)			No: *Income Tax Act*, s. 12	Yes: *Income Tax Act*, s. 7(3.1)			No *Income Tax Act*, s. 4(k)	
Does partner inherit on intestacy?	N/A	No: *Intestate Succ. Act*, ss. 1, 2	Yes: *Estate Admin. Act*, ss. 1, 76	No: *Intestate Succession Act*, ss. 2-4	No: *Devol. Estat. Act*, s. 22	No: Newf. Rules of Court, Rule 56.02(a) and *Intest. Succ. Act*, s. 1	No: *Intestate Succession Act*, s. 2	No: *Intestate Succession Act*, s. 4	No: *Succession Law Reform Act*, ss. 1(1), 44	Yes: *D.D.P.R.A.*, ss. 1(d)(iv), 2	No: *Civil Code*, arts. 666, 667	No: *Intestate Succession Act*, ss. 6-14	No: *Intestate Act*, ss. 2-8, 15
Can partner claim share of estate if not sufficiently provided for in will?	N/A	No: *Family Rel. Act*, ss. 1, 3	No: *Wills Variation Act*, s. 2	Yes: *Dom. Relat. Act*, ss. 1, 2	No: *Prov. for Depend. Act*, s. 1	No: *Family Relief Act*, s. 3	Maybe: *Dom. Relat. Act*, ss, 1, 2(d)-(f)	No: *Testator's Fam. Maint. Act*, s. 2	Yes, if qualifies as "spouse": *Succession Law Reform Act*, ss. 57, 58	No: *Probate Act*, ss. 87-93	No: *Civil Code*, arts. 585 and 684		Yes *Depend. Relief Act*, ss. 1, 2

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
How is relationship dissolved?	N/A	No process required but may enter into private contract	No process required but may enter into separation agreement: *Family Relations Act*, s.120.1	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into separation agreement: *Fam. Law Act*, s. 64	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into separation agreement: *Fam. Law Act*, s. 54	No process required but may enter into separation agreement: *Fam. Law Ref. Act*, s. 47	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract
Is judicial review of terms of dissolution required?	N/A	No	No	No	No	No	No	No	No	No	No	No	No
Is dependent partner entitled to spousal support?	No: *Divorce Act*, s. 2(1)	Yes: *Rossu v. Taylor*	Yes: *Family Relations Act*, s. 1(1), 121, 122	Yes: *Family Maint. Act*, s. 4(3)	Yes: *Child and Fam. Rel. Act*, s. 112(3)(4)	Yes, if party has custody of natural child of relationship: *Family Law Act*, s. 35	1) Yes: Bill 3, *Family Law Act*, s. 1(1) 2) No: *Dom. Rel. Act*, s. 10	Yes: *Family Maint. Act*, s. 2(m), 3	Yes: *Family Law Act*, ss. 29, 33	No: *Family Law Ref. Act*, s. 15	No *Civil Code*, art. 585	Yes : *Family Maint. Act*, ss. 2, 4	Yes: *Family Prop. and Support Act*, s. 35
Can parties contract out of spousal support right and obligation?	N/A		Yes: *Family Relat. Act*, ss. 1(1), 89, 121, 122	Yes: *Family Maint. Act*, s. 4(4)	Yes: *Family Servs. Act*, s. 115(5)	Yes: *Family Law Act*, s. 63, 64		Yes: *Family Maint. Act*, ss. 31, 4, 52	Yes: *Family Law Act*, ss. 53, 54	N/A	N/A	Yes: *Family Maint. Act*, ss. 7, 9	Yes: *Family Prop. and Supp. Act*, ss. 1, 58
Does each partner have right to claim custody or access?	If partner is party to divorce action, may seek leave to apply for custody or access: *Divorce Act*, s. 16	Yes: *Domestic Relations Act*, ss. 55, 56	Yes: *Family Relations Act*, ss. 1(1), 34	Yes: *Family Maint. Act*, ss. 39(1), 1(1)	Yes: *Family Servs. Act*, ss. 1, 129	Yes: *Children's Law Act*, ss. 27, 69(4)(a)-(d)	Yes: *Domestic Relations Act*, s. 29	Yes: *Family Maint. Act*, s. 18	Yes: *Child. Law Ref. Act*, s. 20(1)(5)	Yes: *Custody Act*, s. 4 and *C.J.E.A.*, s. 3	Yes: *Civil Code*, art. 606	Yes: *Children's Law Act*, ss. 2(1), 6	Yes: *Children's Act*, ss. 1, 33
Does custodial parent have right to child support?	N/A	Yes: *Paren. Maint. Act*, ss. 1(b), 4(1), 7, 16	Yes: *Family Relat. Act*, ss. 1(1), 88, 121, 122	Yes: *Family Maint. Act*, s. 36(3)	Yes: *Family Servs. Act*, ss, 1, 113	Yes: *Family Law Act*, ss. 2(1), 37	Yes: *Domestic Relations Act*, s. 28	Yes: *Family Maint. Act*, s. 2(1), 8	Yes, if qualifies as "parent" or may apply on	Yes: *Family Law Ref. Act*, ss. 16-18	Yes *Civil Code*, arts. 585, 586	Yes: *Family Maint. Act*, ss. 2, 3	Yes: *Family Prop. and Supp. Act*, ss. 1, 32

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
									behalf of child: *Family Law Act*, ss 1(1), 31(1), 33 (2)				
Can parties contract out of child support right and obligation?	N/A	Yes: *Paren. Maint. Act*, s. 6	Yes: *Family Relat. Act*, ss. 1(1), 93		Yes: *Family Servs. Act*, s. 115(5)	Yes: *Family Law Act*, ss. 63, 64		Yes, subject to best int. of child: *Family Maint. Act*, ss. 31, 52	Yes, subject to best interests of child: *Family Law Act*, ss. 53, 55, 56	Yes *Familiy Law Ref. Act*, ss. 45, 46	Yes *Civil Code*, art. 587.3	Yes *Family Maint. Act*, ss. 7, 9	Yes *Family Prop. and Supp. Act*, ss. 1, 58
Does each partner have right to claim a share of property acquired during relationship?	N/A	No: *Matrim. Prop. Act*, ss. 1, 3, 37(1), but may have unjust enrichment claim	No: *Family Relations Act*, s. 1, unless parties have made agreement under s.120.1, but may have unjust enrichment claim	No: *Marital Property Act*, but may have unjust enrichment claim	No: *Marital Property Act*, but may have unjust enrichment claim	No: *Family Law Act*, s. 2(1), but may have unjust enrichment claim	No: *Domes. Relat. Act*, s. 16, but may have unjust enrichment claim	No: *Matrim. Prop. Act*, ss. 1, 12(1), but may have unjust enrichment claim	No: *Family Law Act*, s. 1(1), but may have unjust enrichment claim	No: *Family Law Ref. Act*, ss. 1, 4, but may have unjust enrichment claim	No: *Civil Code*, but may have claim based on partnership, contract, or constructive trust: *Beaudoin, Del'Isle*	No: *Matrim. Prop. Act*, s. 2, but may have unjust enrichment claim	No: *Family Prop. and Supp. Act*, s. 1, but may have unjust enrichment claim
Can parties contract out of right to property division?	N/A	May address potential property claims in private agreement	Maybe: *Family Relations Act*, ss. 56, 65, 120.1	May address potential property claims in private agreement	May address potential property claims in private agreement	Yes: *Family Law Act*, ss. 63, 64	May address potential property claims in private agreement	May address potential property claims in private agreement	Yes: *Family Law Act*, s. 54	Yes: *Family Law Reform Act*, s. 46	May address potential property claims in private agreement	May address potential property claims in private agreement	Yes: *Family Prop. and Supp. Act*, ss. 1, 58, or private agreement

APPENDIX C
LEGAL RULES GOVERNING SAME-SEX COHABITATION

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
How is relationship formed?	N/A	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract
Who May enter relationship?	Two people of the same sex	Two people of the same sex	Two people of the same sex	Two people of the same sex	Two people of the same sex	Two people of the same sex	Two people of the same sex	Two people of the same sex	Two people of the same sex	Two people of the same sex	Two people of the same sex	Two people of the same sex	Two people of the same sex
Is partner a competent/compellable witness?	Yes: *Canada Evidence Act*, s. 4	Yes: *Alta. Evidence Act*, s. 4	Yes: *Evidence Act*, s. 7	Yes: *Evidence Act*, s. 5	Yes: *Evidence Act*, s. 3(1)	Yes: *Evidence Act*, s. 2	Yes: *Evidence Act*, s. 3	Yes: *Evidence Act*, s. 45	Yes: *Ontario Evidence Act*, s. 8	Yes: *Evidence Act*, s. 4		Yes: *Sask. Evidence Act*, s. 35	Yes: *Evidence Act*, s. 3(1)
Can couple adopt?	N/A	No: *Child Welfare Act*, s. 58	Yes: *Adoption Act*, ss. 5, 29	No: *Child and Fam. Servs. Act*, s. 66	No: *Family Services. Act*, ss. 1, 66	No: *Adoption of Children Act*, s. 3	No: *Child Welfare Act*, s. 89	No: *Child and Family Services Act*, s. 72	Step-parent adoption permitted: *Re K.*	No: *Adoption Act*, ss. 2(1), 3(1)(2)(4)	Yes: *Civil Code*, art. 546	No: *The Adoption Act*, ss. 1(p), 17(2)	No: *Children's Act*, s. 79(1)(2)
Can partner give health care consent?	N/A	No: *Re A.M.S.* And *Re T.*	Yes: *Health Care Consent*, s. 16 (not in force)	No: *Re A.M.S.* And *Re T.*	No: *Re A.M.S.* And *Re T.*	No: *Advan. Health Dir. Act*, s. 10	No: *Hospitals Act*, s. 54(2)	No: *Re A.M.S.* And *Re T.*	Yes: *Health Care Consent Act*, s. 20(9)		Yes, as "a person who shows a special interest": *Civil Code*, art. 15	No: *Hosp. Standards Regs*, s. 55(1)	Yes: *Health Act*, s. 45
Can partner sponsor immigration?	No *Immigration Regs.*, s. 2(1), 5	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Is couple entitled to benefits/pensions available to families?	No: *Canada Pension Plan Act*, s. 2(1), etc.	No: *Empl. Pen Act*, s. 1 and *Leg. Assem. Pen. Act*, s. 1 and *W.P.A.*,	1) Yes: *Pens. Stat. Amend. Act*, (No. 2) 2) No: *P.B.A.*, s. 1	1) Yes: *T.P.A.*, ss. 8, 10, 27(4.1) 2) No: *P.B.A.*, s. 18(4)(1)	No: *Pension Benefits Act*, s. 1 and *Teacher's Act*, ss. 1, 14		No: *Leg. Assem. Retiring Al. Act*, s. 1	No: *Pension Benefits Act*, s. 1	1) No: Pensions Benefits Act, s.1 2) Yes, in some cases:	No: *C.S.S.A.*, ss. 1(b), 13 and *D.D.P.R.A*, ss. 1(d), 2	No: *Que. Pens. Plan*	Yes: *Sask. Pens. Plan Act*, s. 16	No: *Leg. Assem. Retirement Al. Act*, s. 1

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
		ss. 1, 3	and *P.C.A.*, ss. 15, 20	3) Maybe entitled to empl. benefits: *C.S.S.A.*, s. 30 and *Vogel v. Manitoba*					*Leshner* and *Dwyer*				
Is couple entitled to "family" health insurance?	N/A	No *Health Care Ins. Regs*, s. 1	Yes *Medicare*, s. 1	Yes: *H.S.I.A.*, ss. 2, 20, 21	No: *Med. Services Payment Act*,	Maybe, if dependant: *Med. Care Ins. Act*, ss. 19(1), 2(d)	No: *Med. Care Act*, ss. 1, 3(1)		No: *Health Ins. Act Regs., s. 1.1(1)*	No: *H.S.P.A. Regs, ss. 12,13*		Yes: *S.M.C.I.A.*, s. 2(f)	No: *H.C.I.P.A. Regs.*, s. 2(1)(b)
Is couple entitled to "family" auto insurance?	N/A	No: *Insurance Act*, s. 301	No: *Insurance Act*, ss. 140, 168	Yes: *Insurance Act*, s. 239	No: *Insurance Act*, ss. 232, 255	No: *Auto Act*, s. 33	Yes: *Insurance Act*, s. 131	No: *Insurance Act*, s. 139	No: *Insurance Act*, s.224	Yes: *Insurance Act*, ss. 2, 3	No: *Automobile Insurance Act*, art. 2	Yes: *Auto Acc. Ins. Act*, s. 22	No: *Insurance Act*, ss. 73, 170
Is dependent partner deductible for tax purposes?	No: *Income Tax Act*, s. 252(4)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Are special spousal tax rules available to couple?	1) No: *Income Tax Act*, s. 252(4) 2) Yes: *Rosenberg* and *Moore*	No: *Income Tax Act*, s. 13.2	No: *Income Tax Act*, ss. 6(3), 9, 11		No: *Income Tax Act*, s. 2.4(1)			No: *Income Tax Act*, s. 12	No: *Income Tax Act*, s. 7(3.1)			No: *Income Tax Act*, s. 4(k)	
Does partner inherit on intestacy?	N/A	No: *Intestate Succession Act*, ss. 1, 2	Yes: *Estate Admin. Act*, ss. 1, 76	No: *Domestic Relations Act*, ss. 1, 2 and *Intestate Succession Act*, ss. 2-4	No: *Devolution Est. Act*, s. 22	No: *Rules of Court*, Rule 56.02 and *Intestate Succ. Act*, s. 1	No: *Intestate Succ. Act*, s. 2	No: *Intestate Succ. Act*, s. 4	No: *Succession Law Ref. Act*, ss. 1, 44	No: *Probate Act*, ss. 87-93	No: *Civil Code*, arts. 666, 667	No: *Intestate Succes. Act*, ss. 6-14	No: *Intestate Act*, ss. 2-8, 15
Can partner claim share of estate if not sufficiently provided for in will?	N/A	No: *Family Rel. Act*, ss. 1, 3	No: *Wills Variation Act*, s. 2	No: *Domestic Relations Act*, ss. 1, 2	No: *Prov. for Depend. Act*, ss. 1, 2(1)	No: *Family Relief Act*, s. 3	Maybe, if dependant: *Domestic Relations Act*, ss. 1, 2	No: *Testator's Fam. Maint. Act*, s. 2	No: *Succession Law Ref. Act*, ss. 57, 58	No: *D.D.P.R.A.*, ss. 1(d), 2	No: *Civil Code*, arts. 585 and 684		No: *Depend. Rel. Act*, ss. 1, 2

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
How is relationship dissolved?	N/A	No process necessary but may enter into private contract	No process necessary but may enter into private contract	No process necessary but may enter into private contract	No process necessary but may enter into private contract	No process necessary but may enter into private contract	No process necessary but may enter into private contract	No process necessary but may enter into private contract	No process necessary but may enter into private contract	No process necessary but may enter into private contract	No process necessary but may enter into private contract	No process necessary but may enter into private contract	No process necessary but may enter into private contract
Is judicial review of terms of dissolution required?	N/A	No	No	No	No	No	No	No	No	No	No	No	No
Is dependent partner entitled to spousal support?	No: *Divorce Act*, s. 2(1)	No: *Domest. Relat. Act*, s. 15	Yes: *Family Relat. Act*, s. 1(1), 121, 122	No: *Family Maint. Act*, s. 4	No: *Child and Fam. Servs. and Fam. Rel. Act*, s. 112	No: *Family Law Act*, s. 35	No: *Domest. Relat. Act*, s. 10	No: *Family Maint. Act*, s. 2(m)	No *Family Law Act*, s. 29	No *Family Law Ref. Act*, s. 15	No *Civil Code*, art. 633	No *Family Maint. Act*, s. 2	No *Fam. Prop. and support Act*, s. 35
Can parties contract out of spousal support right and obligation?	N/A	N/A	Yes: *Family Rights Act*, ss. 1(1), 89, 121, 122	N/A	N/A	N/A	N/A	N/A	No *Family Law Act*, ss. 53, 54	N/A	N/A	N/A	N/A
Does each partner have right to claim custody or access?	If partner is party to divorce action, may seek leave to apply for custody or access: *Divorce Act*, s. 16	Yes: *Domest.ic Relations Act*, s. 56	Yes: *Family Relations Act*, ss. 1(1), 34	Yes: *Family Rights Act*, ss. 1(1), 38	Yes: *Family Services Act*, ss. 1, 129	Yes: *Children's Act*, ss. 27, 69(4)(a)-(d)	Yes: *Domestic Relations Act*, s. 29	Yes: *Family Maint. Act*, s. 18(2)	Yes: *Child. Law Ref. Act*, s. 20(1)(5) and *Buist v. Greaves*	Yes *Custody Act*, s. 4	Yes *Civil Code*, arts. 514, 605	Yes: *Children's Law Act*, s. 6	Yes: *Children's Act*, ss. 1, 33
Does custodial parent have right to child support?	N/A/	Maybe: *Parentage and Maint. Act*, ss. 1(b), 4(1), 7, 16	Yes: *Fam.ily Relat. Act*, ss. 1(1), 88, 91	Yes: *Fam.ily Maint. Act*, s. 36(4)	Yes: *Family Services Act*, ss. 1, 113	Yes: *Family Law Act*, ss. 2(1), 37	Yes: *Domestic Relat. Act*, ss. 28, 29	Yes *Family Maint. Act*, ss. 2(1), 8, 11	Yes *Family Law Act*, ss. 31(1), 1(1), 33, 21	Yes *Family Law Ref. Act*, ss. 1, 16-18	Yes *Civil Code*, art. 586	Yes *Family Maint. Act*, ss. 2, 3, 13	Yes *Family Prop. and Supp. Act*, ss. 1, 32
Can parties contract out of child support right and obligation?	N/A	Yes: *Parentage and Maint.*	Yes: *Fam.ily Relat. Act*, ss. 1(1), 93, 121,		Yes: *Family Servs. Act*, s. 115(5)	No: *Family Law Act*, ss. 63, 64		Yes *Family Maint. Act*, s. 52	No *Family Law Act*, s. 53, 54	No *Family Law Ref. Act*, ss.	Yes *Civil Code*, art. 587.3	Yes *Family Maint. Act*, ss. 2, 79	Yes *Family Prop. and Supp.*

APPENDIX D
LEGAL RULES GOVERNING NON-CONJUGAL RELATIONSHIPS

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
How is relationship formed?	N/A	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into domestic contract: *Fam. Law Act*, s. 63	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract
Who May enter relationship?	Relatives or l companions	Relatives or companions	Relatives or companions	Relatives or companions	Relatives or companions	Relatives or companions	Relatives or companions	Relatives or companions	Relatives or companions	Relatives or companions	Relatives or companions	Relatives or companions	Relatives or companions
Is partner a competent/compellable witness?	Yes: *Canada Evidence Act*, s. 4	Yes: *Alberta Evidence Act*, s. 4	Yes: *Evidence Act*, s. 7	Yes: *Evidence Act*, s. 5	Yes: *Evidence Act*, s. 3(1)	Yes: *Evidence Act*, s. 2	Yes: *Evidence Act*, s. 3	Yes: *Evidence Act*, s. 45	Yes: *Ontario Evidence Act*, s. 8	Yes: *Evidence Act*, s. 4		Yes: *Sask. Evidence Act*, s. 35	Yes: *Evidence Act*, s. 3(1)
Can couple adopt?	N/A	1) Yes: *Child Welfare Act*, s. 58 2) No: *Adult Adoption Act*, s. 6	Yes: *Adoption Act*, ss. 5, 29	No: *Child and Family Services. Act*, s. 66	No: *Family Services Act*, ss. 1, 66	No: *Adoption of Children Act*, s. 3	No: *Child Welfare Act*, s. 89	No: *Child and Family Services Act*, s. 72	No: *Child and Family Services. Act*, s. 136(1)	No: *Adoption Act*, s. 2(1)(c)	Yes: *Civil Code*, art. 546	No: *The Adoption Act*, s. 17(2)	No: *Children's Act*, s. 79(1)(2)
Can partner give health care consent?	N/A	No: *Re A.M.S.* and *Re T.*	Yes: *Health Care Consent Act*, s. 16 (not in force)	No: *Re A.M.S.* and *Re T.*	No: *Re A.M.S.* and *Re T.*	Maybe, if a relative: *Advance Health Dir. Act*, s. 10	No: *Re A.M.S.* and *Re T.*	Maybe, if next of kin: *Hospitals Act*, s. 54(2)	Yes: *H.C.C.A.*, s. 20(9)		Maybe, if a relative or "a person who shows a special interest": *Civil Code*, art. 15	Maybe: *Hospital Standards Regs.* S. 55(1)	Maybe, if relative or next of kin: *Health Act*, s. 45
Can partner sponsor immigration?	No: *Immigration Regs.*, ss. 5, 2(1)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
Is couple entitled to benefits/pensions available to families?	No: *Canada Pension Plan Act*, s. 2(1)	1) Maybe: *Legis. Assem. Pension*, s. 25 2) No: *Emp. Pens. Act*, ss. 1, 3 and *W.P.A.*	Maybe: *Pens. Ben. St. Act*, ss. 1(1), 34, 35 and *Pens. Colle. Act*, ss. 15, 20	1) Yes: *T.P.A.*, ss. 8, 10, 27(4.1) 2) Maybe: *C.S.S.A.*, s.30 3) No: *P.B.A.*, s.18(4)	No: *Teacher's Act*, ss. 1, 14 and *Pens. Ben. Act*, ss. 1, 43		No: *Leg. Assem.bly Retiring All. Act*, s. 1	Maybe: *Pension Benefits Act*	No: *Ontario Pension Benefits Act*, s. 1(1)	1) Yes: *C.S.S.A.*, ss. 1(b), 13 2) No: *D.D.P.R.A.*, s. 1(d), 2		Yes: *S.P.P.A., s. 16*	No: *Leg. Assem. Retirement All. Act*, s. 1
Is couple entitled to "family" health insurance?	N/A	Maybe: *Health Care Ins. Regs*, s. 1	Maybe: *Medicare*, s. 7	No: *Health Serv. Ins. Act*, ss. 2, 20, 21	Maybe: *Med. Serv. Pay. Regs.*	Maybe, if dependant: *Med. Care Ins. Act*, ss. 2(d), 19(1)	No: *Med. Care Act*, ss. 1, 3(1)	Maybe: *Hosp. Ins. Regs.*, s. 3	No: *Health Ins. Act*, s. 1.1(1)	No: *Health Serv. Pay. Act*, ss. 12, 13		Yes: *S.M.C.I.A.*, s. 2(f)	No: *H.C.I.P.A. Regs.*, s. 2(1)
Is couple entitled to "family" auto insurance?	N/A	Maybe, if dependant relative: *Insurance Act*, s. 325	Maybe: *Insurance Act*, s. 167	Yes: *Insurance Act*, s. 239	Maybe, if a dependant relative: *Insurance Act*, s. 255	Maybe: *Auto Ins. Act*, s. 33	No: *Insurance Act*, s. 131	Maybe: *Auto Insur. Act*, s. 139	No: *Insurance Act*	Yes: *Insurance Act*, ss. 2, 3		Yes: *Auto Acc. Ins. Act*, s. 22	Maybe: *Insurance Act*, ss. 73, 170
Is dependent partner deductible for tax purposes?	Maybe : *Income Tax Act*, s. 122.5	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Are special spousal tax rules available to couple?	No: *Income Tax Act*, s. 122.5	Maybe, if qualified dependant: *Income Tax Act*, s. 13.2	Maybe: *Income Tax Act*, ss. 8, 9		Maybe: *Income Tax Act*, s. 2.4(1)			Maybe: *Income Tax Act*, s. 2	No: *Income Tax Act*, s. 7(3.1)			No: *Income Tax Act*, s. 4(k)	
Does partner inherit on intestacy?	N/A	Maybe: *Intestate Succes. Act*, ss. 1, 4	Maybe: *Estate Admin. Act*, ss. 81, 84	1) Maybe: *I.S.A.*, ss. 2-4 and *D.R.A.*, ss. 1, 2	1) Maybe: *Devol. Estat. Act*, s. 22 2) Yes: *P.D.A.*, ss. 2(1.1), 2(4)	Maybe: *Intest. Succ. Act*, ss. 4, 5	Maybe: *Intest. Succ. Act*, s. 3	Maybe, if relative: *Intestate Succes. Act*, ss. 7-10	No: *Succession Law Reform Act*, ss. 1, 44	Maybe *Probate Act*, ss. 87-93	Maybe *Civil Code*, art. 666	Maybe *Intest. Succes. Act*, ss. 9-12	Maybe *Intest. Succ. Act*, ss. 2-8
Can partner claim share of estate if not sufficiently	N/A	Maybe: *Family Relat. Act*, ss. 1, 3	Yes, if child or parent: *Wills Variation*	Maybe: *Dom. Relat. Act*, ss. 1, 2	Maybe, if dependant: *Prov. for Dep.*	Maybe: *Family Relat. Act*, ss. 1, 3	Maybe: *Dom. Relat. Act*, ss. 1,	Maybe: *Test. Family Maint. Act*, ss.	Maybe, if parent, child or sibling who	Maybe, if dependant *D.D.P.R.A.*,	Maybe, if relative in the direct line in		Maybe *Depend. Relief Act*, ss.

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
provided for in will?			*Act*, s. 2		*Act*, s. 1		2(d)-(f)	2, 3	was "dependent": *Succession Law Reform Act*, ss. 57, 58	ss. 1(d), 2	the first degree: *Civil Code*, arts. 585 and 684		1, 2
How is relationship dissolved?	N/A	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into separation agreement: *Family Law Act*, s. 64	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract	No process required but may enter into private contract
Is judicial review of terms of dissolution required?	N/A	No	No	No	No	No, but may bring application: *Family Law Act*, s. 66	No	No	No	No	No	No	No
Is dependent partner entitled to spousal support?	No: *Divorce Act*, s. 2(1)	No: *Domes. Relat. Act*, s. 15	Maybe, if child/parent: *Family Relations Act*, s. 1(1) and ss. 88-90, 121, 122	No: *Family Maint. Act*, s. 4	1) Maybe if child/parent: *Child and F.S. F.R.A*, ss. 1, 114 2) Yes: *F.R.A.*, s. 112(3)	No: *Family Law Act*, s. 35	No: *Domestic Relat. Act*, s. 10	Maybe, if child/parent: *Family Maint. Act*, s. 2(m) and s. 15	Maybe, if child/parent: *Family Law Act*, s. 1(1) and ss. 29, 55, 31, 32	Maybe, if child/parent: *Family Law Ref. Act*, s. 15 and s. 17	Maybe, if relative in direct line in the first degree: *Civil Code*, art. 585	No: *Family Maint. Act*, s. 2	Maybe, if child/parent: *Family Prop. and Supp. Act*, s. 35 and s. 33
Can parties contract out of spousal support right and obligation?	N/A	N/A	Yes *Family Relat. Act*, s. 121, 122	N/A	Maybe: *Family Relat. Act*, s. 115	N/A	N/A	Maybe: *Family Maint. Act*, s. 52	No: *Family Law Act*, ss. 53, 54			N/A	No: *Family Prop. and Supp. Act*, ss. 1, 58
Does each partner have right to claim custody or access?	If partner is party to divorce action, may seek leave to apply for custody or access: *Divorce Act*, s. 16	Yes: Implicit in *Domestic Relat. Act*, ss. 56	Yes: Implicit in *Family Relat. Act*, ss. 1(1), 34	Yes: *Family Maint. Act*, ss. 1(1), 38	Yes: *Family Supp. Act*, ss. 1, 129	Yes: *Children's Act*, ss. 27, 69(4)	Yes: Implicit in *Domestic Relat. Act*, s. 29	Yes: *Family Maint. Act*, s. 18(2)	Yes *Children's Law Ref. Act*, ss. 21, 20(1)(5)	Yes *Custody Act*, s. 4 and *C.J.E.A.*, s. 3	Yes *Civil Code*, art. 606	Yes *Children's Law Act*, s. 6	Yes *Children's Act*, ss. 1, 33
Does custodial parent have	N/A	Maybe:	Yes:	Yes:	Yes:	Yes:	Yes:	Yes:	Yes	Yes	Yes	Yes	Yes

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right to child support?		*Parentage and Maint. Act*, ss. 1(b), 4(1), 7, 16	*Family Relat. Act*, ss. 88, 91	*Family Maint. Act*, s. 36(4)	*Family Relat. Act*, s. 113	*Family Law Act*, ss. 2(1), 37	*Domestic Relat. Act*, ss. 28(4), 29	*Family Maint. Act*, ss. 2(1), 8, 11	*Family Law Act*, ss. 1(1), 31, 33	*Family Law Ref. Act*, ss. 1, 16-18	*Civil Code*, art 586	*Family Maint. Act*, ss. 2, 3, 13	*family Prop. and Supp. Act*, ss. 1, 32
Can parties contract out of child support right and obligation?	N/A	Yes: *Parentage and Maint. Act*, s. 6	Yes: *Family Relat. Act*, ss. 121, 122		Yes: *Family Supp. Act*, s. 115(5)	No: *Family Law Act*, ss. 63, 64		Yes: *Family Maint. Act*, s. 52	No *Family Law Act*, ss. 53, 54	No *Family Law Ref. Act*, ss. 46, 47	Yes *Civil Code*, art. 587.3	Yes *Family Maint. Act*, ss. 2, 7, 9	No *Family Prop. and Supp. Act*, ss. 1, 58
Does each partner have right to claim a share of property acquired during relationship?	N/A	No: *Matrim. Prop. Act*, ss. 1, 3, 37(1), but may have unjust enrichment claim	No: *Family Relat. Act*, Part V, but may have unjust enrichment claim	No: Marital Property Act, but may have unjust enrichment claim	No: Marital Property Act, but may have unjust enrichment claim	No: *Family Law Act*, s. 2(1), but may have unjust enrichment claim	No: *Domestic Relat. Act*, s. 16, but may have unjust enrichment claim	No: *Family Prop. Act*, ss. 1, 12(1), but may have unjust enrichment claim	No: *Family Law Act, s. 1(1)*, but may have unjust enrichment claim	No: *Family Law Ref. Act*, s. 5, but may have unjust enrichment claim	No: *Civil Code*, art. 416, but may have claim in partnership, contract, or constructive trust	No: *Matrim. Prop. Act*, s. 2, but may have unjust enrichment claim	No: *Familiy Prop. and Supp. Act.*, s. 1, but may have unjust enrichment claim
Can parties contract out of right to property division?	N/A	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement

	FED	ALTA	BC	MAN	NB	NEWF	NWT	NS	ONT	PEI	QUE	SASK	YT
		Act, s. 6	122							46, 47			*Act*, ss. 1, 58
Does each partner have right to claim a share of property acquired during relationship?	N/A	No: *Matrim. Prop. Act*, ss. 37(1), 3(1), 1	No: *Family Relat. Act*, s. 1, but may have unjust enrichment claim	No: *Marital Property Act*, but may have unjust enrichment claim	No: *Marital Property Act*, but may have unjust enrichment claim	No: *Family Law Act*, s. 2(1), but may have unjust enrichment claim	No: *Domestic Relat. Act*, s. 16, but may have unjust enrichment claim	No: *Matri. Prop. Act*, ss. 1, 12(1), but may have unjust enrichment claim	No: *Family Law Act*, s. 1(1), but may have unjust enrichment claim	No: *Family Law Ref. Act*, ss. 1, 4, but may have unjust enrichment claim	No: *Civil Code*, art. 416, but may have claim in partnership, contract, or constructive trust	No: *Matr. Prop. Act*, s. 2, but may have unjust enrichment claim	No: *Family Prop. and Supp. Act*, s. 1, but may have unjust enrichment claim
Can parties contract out of right to property division?	N/A	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement	May address potential property claims in private agreement